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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

U.S. MARINE CORPORATION and
BAYLINER MARINE CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION, ALLIED INDUSTRIAL
WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner U.S. Marine Corporation acquired a Chrysler Corporation outboard motor factory in an asset sale in 1984. U.S. Marine hired 223 out of the 257 former Chrysler workers who applied for jobs, but it did not hire the remaining 34 and it imposed its own initial terms and conditions of employment. The National Labor Relations Board, after finding that U.S. Marine had unlawfully refused to recognize and bargain with Chrysler's union, ordered the company to hire the other 34 former Chrysler workers and to reinstitute the terms and conditions of employment that were in effect under Chrysler.

The questions presented are:

1. Whether the Board may order a successor employer that sets its own initial terms and conditions of employment in advance of hiring any of the predecessor's workers to reinstitute the predecessor's terms because the successor subsequently refused to recognize and bargain with the predecessor's union.

2. Whether the Board and the court of appeals misallocated the statutory burden of proof by ordering U.S. Marine to hire the remaining 34 former Chrysler workers in significant part because the company failed to provide a convincing rationale for its decision not to hire the workers.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

All of the parties to the proceedings below are listed in the caption.

Petitioners U.S. Marine Corporation and Bayliner Marine Corporation are wholly-owned subsidiaries of Brunswick Corporation.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

U.S. Marine Corporation and Bayliner Marine Corporation (collectively "U.S. Marine") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (App., *infra*, 1a-60a) is reported at 944 F.2d 1305. (The original panel opinion was vacated when the court of

appeals ordered rehearing *en banc* and was withdrawn from publication. 916 F.2d 1183). The decision and order of the National Labor Relations Board (App., *infra*, 61a-159a), which includes the decision of the administrative law judge, is reported at 293 N.L.R.B. 669.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of sections 8(a)(1), 8(a)(3), 8(a)(5) and 10(c) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5), and 160(c) are set forth at App., *infra*, 160a-161a.

STATEMENT

This case raises issues of great practical importance both to the administration of the National Labor Relations Act and to efforts to revitalize the nation's economy. The Board's order requiring U.S. Marine Corporation retroactively to restore the terms of its predecessor's collective bargaining agreement violates both the fundamental federal policy of free collective bargaining and this Court's holding in *NLRB* v. *Burns Int'l Security Systems, Inc.*, 406 U.S. 272 (1972). The decision would make it

impossible for successor employers to make the changes that may be necessary to revive "moribund business[es]," and would thus "discourage and inhibit the transfer of capital." 406 U.S. at 287-288. The court of appeals, sitting *en banc*, was divided 6-5 on this issue. As Judge Easterbrook recognized in his dissent, the majority's decision conflicts with decisions of several other circuits. App., *infra*, 54a.[1]

In addition, the Board's finding that the General Counsel established a *prima facie* case of antiunion discrimination reflects an unwarranted relaxation of the requirements of Section 10(c) of the Act and of this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). The Board has fallen into the unacceptable habit of considering the failure of an employer convincingly to explain its employment decisions as an element supporting the General Counsel's *prima facie* case. But Section 10(c) and *Transportation Management* make it clear that the General Counsel has the burden of proving unlawful discrimination and that the employer cannot be put to the task of disproving discrimination at the *prima facie* case stage. Precisely the same approach taken by the Board in this case and enforced by the court of appeals was recently rejected by the Second Circuit.

1. In 1983, Chrysler Corporation decided to get out of the outboard motor business. Chrysler entered into discussions with its largest customer, Bayliner Marine

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[1] Judges Posner, Coffey, Manion and Kanne joined Judge Easterbrook's dissent.

Corporation ("Bayliner"), for the sale of its Hartford, Wisconsin factory. In January 1984, after "extended and, at times, acrimonious" negotiations (App., *infra*, 96a), the parties agreed upon the terms of an asset sale. Chrysler closed the factory and terminated all of its employees on Friday, January 13, 1984. Bayliner created a new subsidiary, U.S. Marine Corporation, to take over the Chrysler assets and operate the facility. *Id.* at 3a-6a.

U.S. Marine planned to reopen the factory and resume operations on Monday, January 23, 1984. Between January 16th and January 20th, the company interviewed some 500 job applicants, beginning with the former Chrysler workers who applied for jobs.[2] James Hoag, Bayliner's Vice President for Administration and the new General Manager of U.S. Marine, was in charge of the hiring process. In deciding whom to hire, Hoag called in five Bayliner executives to conduct the interviews. Hoag considered the interview results and also consulted with three former Chrysler executives who rated each of the former Chrysler workers on a scale of one to three.

U.S. Marine notified 219 applicants (all of them former Chrysler employees) that they had been hired and directed them to report for work the following Monday,

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[2] There were a total of over 2,000 applicants. Outside applicants were screened and selected for interviews by the State of Wisconsin's Job Service, but U.S. Marine instructed the Job Service to send all of the former Chrysler workers for interviews and interviewed them first. App., *infra*, 110a. U.S. Marine had previously informed the workers that it would be "hiring the best qualified individuals from the local area. You, as an employee of Chrysler, are encouraged to apply for work with U.S. Marine." *Ibid.*

January 23. The company did not notify the unsuccessful applicants, but if they inquired they were told that their applications were being kept on file for possible future consideration. By January 30, U.S. Marine had hired a total of 261 workers, including 223 of the 257 former Chrysler workers who applied and 16 out of the 17 former union officers and shop stewards. Between that time and August 31, 1984, total employment increased to a peak of 323, but no additional former Chrysler workers were hired. App., *infra*, 6a-7a, 27a & n.15, 130a.

U.S. Marine made it clear to all concerned before the sale was finalized that it intended to set its own initial terms and conditions of employment. During initial negotiations, Bayliner's Chairman told Chrysler that "Bayliner would offer the employees its own 'plans and programs' to replace those in effect under Chrysler." App., *infra*, 97a. In December 1983, Hoag told union officials that the new company would not agree to be bound by the terms of the Chrysler labor contract. *Id.* at 63a, 114a. During the employment interviews, U.S. Marine carefully explained the new terms and conditions to each applicant. *Id.* at 5a, 111a. The employees thus knew, before they were hired and began work for U.S. Marine on January 23, that they would be working under the company's own terms, and not those that had been in effect under Chrysler.

Respondent International Union, Allied Industrial Workers of America, AFL-CIO (the "Union") requested recognition from U.S. Marine on January 25, 1984, two days after the company began operations. One week later, the Union filed the first of several unfair labor practice charges with the National Labor Relations Board alleging that the company had unlawfully refused to recognize

and bargain with the Union. The company took the position that it was not required to recognize or negotiate with the Union until it hired its "full complement" of employees, and that it did not expect to reach that point until June, 1984. The Board's Regional Director rejected the company's argument, issued a complaint, and sought an injunction under section 10(j) of the Act, 29 U.S.C. § 160(j), requiring U.S. Marine to recognize the Union. The injunction was issued (and U.S. Marine recognized the Union) on May 10, 1984. Between that date and October 1985, the parties held nineteen negotiation sessions but failed to reach agreement. App., *infra*, 8a-10a.

2. The unfair labor practice charges were heard before an administrative law judge over nine days in September, October and November, 1985. On August 22, 1986, the ALJ concluded that U.S. Marine had violated the Act by refusing to recognize the Union on January 25, 1984, and by failing thereafter to bargain in good faith. App., *infra*, 153a. But he also concluded that "the General Counsel has not established a *prima facie* case that the failure to rehire the 34 former Chrysler employees violated [the Act]." *Id.* at 133a. The ALJ based that conclusion on his observation that there was no evidence that antiunion discrimination played a part in the hiring decision (*id.* at 127a-128a, 131a-132a):

> I can discern no real, substantive, evidence that the refusal to hire the 34 was based upon their union membership or upon their former employment with Chrysler * * * .
>
> I cannot find, here, that the General Counsel has established that the 34 were not rehired because

> of disparate treatment. * * * There is no substantive evidence of why one person was hired and one was not hired. I do not believe that fairness, or principles of due process, or the principles of *Wright Line* * * * require that Respondents here be put to the test of carrying forward the burden of proving that their hiring process did not discriminate against the 34 alleged discriminatees.

The ALJ also did not order the company to restore the terms and conditions of employment that had been in effect under Chrysler.[3]

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[3] The General Counsel filed specific exceptions to the ALJ's failure to require U.S. Marine to reinstitute Chrysler's terms, and part III(D) of the General Counsel's Brief to the Board was dedicated to this issue. The General Counsel argued that although "a successor is ordinarily free to set initial terms of employment," U.S. Marine was not in this case because of its "illegal hiring practices." General Counsel's Brief to the Board at 21. Thus, the General Counsel asserted, "[t]he appropriate remedy requires Respondents to rescind their initial terms and conditions of employment, and all adverse unilateral changes occurring after that time." *Ibid.*

The Union also excepted to the ALJ's failure "to restore the Union to the position it would have been in but for Respondent's [alleged] unlawful scheme * * * ." Charging Party's Exceptions at 3. In support of that exception, part II(C) of the Union's Brief in Support of its Exceptions argued that "the Respondent should be required to restore the status quo ante relative to the wages, hours, and other terms and conditions of employment as they existed when Respondent acquired the Hartford plant from Chrysler on January 13, 1984 * * * ." *Id.* at 32. The Union's brief claimed that U.S. Marine was seeking "to circumvent [the *Burns*] principles and [to] utilize[] the Board's

(Continued on following page)

On April 17, 1989, the Board affirmed the ALJ's findings and conclusions for the most part, but went beyond the judge in two critical respects. First, the Board found that U.S. Marine had unlawfully discriminated against the 34 former Chrysler workers it had not hired, and ordered the company to hire them all with full backpay and benefits. Applying the factors set forth in *Lemay Caring Center*, 280 N.L.R.B. 60 (1986), enforced, 815 F.2d 711 (8th Cir. 1987), the Board held that there was substantial evidence of antiunion animus and an intent to avoid bargaining with the Union. App., *infra*, 67a-69a. In addition, U.S. Marine "advanced no legitimate reasons for the refusal to hire the 34 former Chrysler employees" and "failed to prove its assertion that the employees who were not hired displayed employment histories, health, seniority, or allergenic characteristics that were substantially different from those of the employees who were hired." *Id.* at 68a. In light of its finding of antiunion animus, and its belief that U.S. Marine failed to offer any "substantive evidence of why one person was hired and

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Spruce Up rationale in a manner so as to aid it in its unlawful overall scheme * * * ." *Id.* at 35.

U.S. Marine, of course, did not except to the fact that the ALJ did not order it to reinstitute Chrysler's terms of employment. But it did "except[] to any remedy in light of the fact that no unfair labor practices were committed." U.S. Marine Exceptions at 16e. In its brief in support of its exceptions, U.S. Marine asserted that it "has not violated the Act through any unilateral actions." U.S. Marine Br. in Support of Exceptions at 39.

one was not hired," the Board concluded that the administrative law judge should have found that the company acted unlawfully by failing to hire the 34. *Id.* at 67a-69a.

In addition, the Board ordered U.S. Marine to restore the terms and conditions of employment that were in effect under Chrysler before the sale.[4] The Board acknowledged that under *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), "a successor employer is ordinarily free to set initial employment terms, without preliminary bargaining with the incumbent union." App., *infra*, 70a. But interpreting dictum from *Burns*, the Board held that when " 'it is perfectly clear that the new employer plans to retain all of the employees in the unit,' the successor must consult the union before altering the terms and conditions of employment." *Id.* at 70a-71a. The Board held that U.S. Marine "forfeited any right they may have had as a successor to impose initial terms when they embarked on their deliberate scheme to avoid bargaining with the Union by their discriminatory hiring practices." *Id.* at 72a. Quoting from an earlier decision,[5] the Board reasoned that it would be inappropriate to "confer *Burns*

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[4] Member Cracraft dissented from that part of the Board's order. She argued that requiring U.S. Marine to reinstitute Chrysler's terms would violate due process because the General Counsel's complaint did not allege that U.S. Marine acted unlawfully in setting initial terms and the issue was thus not fully litigated. App., *infra*, 80a-85a.

[5] *State Distributing Co.*, 282 N.L.R.B. 1048, 1049 (1987).

rights on an employer that has not conducted itself like a lawful *Burns* successor." *Id.* at 73a.[6]

3. The court of appeals, sitting *en banc*, enforced the Board's order. On the issue of whether the Board properly ordered U.S. Marine to hire the 34 former Chrysler employees, the court of appeals (like the Board) applied the analytical framework of *Lemay Caring Center* and held that there was sufficient evidence of discriminatory motivation to sustain the Board's order. App., *infra*, 21a-29a.[7] The court held that there was substantial evidence of antiunion animus and that the company intentionally manipulated its employment projections to avoid a bargaining obligation. *Id.* at 22a, 23a-29a. In addition, the court agreed with the Board that the failure of U.S. Marine to demonstrate a "convincing rationale for [its] refusal to hire the predecessor's employees" and the fact that "U.S. Marine was unable to explain [the] rejection[ ]" of the 34 workers were important elements in the General Counsel's *prima facie* case. *Id.* at 22a. In the court's view, the Board's finding that "there is no substantive evidence of why one person was hired and one was not hired" supported the General Counsel's *prima facie* case. *Ibid.*

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[6] The Board disagreed with the ALJ in two additional respects: (1) it ordered U.S. Marine to reimburse members of the Union's negotiating committee for lost wages; and (2) it did not include a visitatorial clause in its order. App., *infra*, 74a-75a & n.14. U.S. Marine did not challenge those aspects of the Board's order on appeal.

[7] The court of appeals referred to *Lemay Caring Center* by its other name, *Dasal Caring Centers*, but it is the same decision. See 280 N.L.R.B. at 60.

By a 6-5 vote, the court of appeals also enforced the Board's order requiring U.S. Marine to restore the Chrysler terms and conditions of employment. App., *infra*, 30a-36a.[8] The court acknowledged the *Burns* rule that a successor is ordinarily permitted to set its own initial terms and is not bound by the terms of the predecessor's contract. But the court upheld the Board's reliance on the *Burns* dictum that a successor may be required to "initially consult" with the Union when "it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Id.* at 31a.

The court of appeals recognized that in a series of cases beginning with *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975), the Board and the courts of appeals have held that when a successor indicates beforehand that it intends to set its own initial terms, it can do so even though it was "perfectly clear" in advance that it planned to retain substantially all of the predecessor's workers. App., *infra*, 34a-35a. The court agreed with U.S. Marine that it had "established" that "applicants were informed in advance that they would be working under different terms." *Id.* at 42a n.26. But the

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[8] The court of appeals unanimously rejected the General Counsel's argument that the court did not have jurisdiction to consider U.S. Marine's claim that the Board improperly ordered the company to restore Chrysler's terms and conditions of employment. The court held that "the Board was put on notice of this matter by the General Counsel and Union's (1) exceptions to the ALJ's recommended order, and (2) extensive briefs to the Board. The Board not only had the opportunity to but did resolve the issue." App. *infra*, 30a n.17. See also note 3, *supra*.

court held that the *Spruce Up* exception applies only when there is a "*legitimate* ambiguity as to whether the new employer would in fact be able to hire the predecessor's employees [under] the new terms" and does not apply in this case because "U.S. Marine, *by its illegal activity*, has created any ambiguity as to whether all or nearly all Chrysler employees would have accepted positions." *Id.* at 35a.

Finally, the court of appeals rejected U.S. Marine's argument that the Board's remedy was improperly punitive. App., *infra*, 36a-39a. It agreed that the Board has no authority to impose punitive remedies, but it held that "[b]ecause the Board's order remedies a violation of the Act, we cannot accept the company's claim that the Board's order is punitive." *Id.* at 37a. In the court's view, the Board's order was "designed to prevent U.S. Marine from taking advantage of its wrongdoing to the detriment of the employees." *Id.* at 38a. Although the remedy was "imprecise," it "estimate[d] to some degree the situation that would have occurred if there had been no discrimination and the old work force, through its union, had commenced negotiations with the employer." *Ibid.*

Judge Easterbrook, joined by Judges Posner, Coffey, Manion and Kanne, dissented from the portion of the court's opinion requiring U.S. Marine to reinstate the terms and conditions of employment that were in effect under Chrysler. They pointed out that the court of appeals' decision was in conflict with decisions of several other circuits. "[T]he Second, Fourth, Ninth, and District of Columbia Circuits have held that successors may set their own terms and conditions whether or not the firm expects its predecessor's employees to cross over *en*

masse. Saks & Co. v. *NLRB*, 634 F.2d 681, 687-88 (2d Cir. 1980); *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 881-82 (2d Cir. 1977); *NLRB* v. *Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975), enforcing 209 N.L.R.B. 194 (1974); *Kallmann* v. *NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981); *NLRB* v. *Dent*, 534 F.2d 844, 847 (9th Cir. 1976); *International Association of Machinists* v. *NLRB*, 595 F.2d 664, 672-76 (D.C. Cir. 1978)." App., *infra*, 54a.

The dissenting judges pointed out that under *Burns* and *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), a successor is entitled to set its own initial terms. App., *infra*, 53a. In the dissent's view, the Board's finding that U.S. Marine's unlawful conduct created ambiguity as to whether it would have hired substantially all of Chrysler's workers was irrelevant to whether the company was entitled to set these terms:

> Let us take it as established that, but for its unfair labor practices, U.S. Marine would have hired substantially all of Chrysler's workers. How does this support the Board's order? U.S. Marine would have been free to use its own terms even if it had shouted from the rooftops that it planned to hire every Chrysler employee who applied. Uncertainty about the number of workers to be hired cannot matter when even perfect knowledge would not support the Board's directive.

Id. at 55a-56a. "If, as four other courts of appeals hold, U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to hire, then these terms establish the benchmark that the Board is entitled to restore. Had U.S.

Marine followed the NLRA to a T, all would have labored on U.S. Marine's terms, not Chrysler's." *Id.* at 56a.

Judge Easterbrook and the other dissenters stated that because the Board's remedy goes beyond make-whole relief, it is improperly punitive. The Board's use of "[t]he telling term 'forfeited' gives away the game." App., *infra*, 57a. The Board's order may have been remedial if it were based on a finding that U.S. Marine would have agreed to Chrysler's terms had it commenced bargaining when it should have (in January 1984) rather than when it did (in May 1984). App. *infra*, 58a. But the order was *not* based on any such finding, and no such finding could have been sustained. "It is unimaginable that U.S. Marine would have agreed to use those terms * * * . The Board's rationale is unrelated to the anticipated (or actual) outcome of bargaining; instead the Board found that by deeds after reopening the plant U.S. Marine retroactively 'forfeited' the entitlement to set its own terms. That is the language of penalty; its order is the fact of penalty." *Ibid.*

REASONS FOR GRANTING THE PETITION

The two questions presented in this petition are of critical importance to the proper administration of the National Labor Relations Act and to the orderly and efficient transfer of capital and the rehabilitation of failing businesses. The first question – whether the Board properly required U.S. Marine to restore Chrysler's terms and conditions of employment – is the one on which the court of appeals divided 6-5. In dissent, Judge Easterbrook pointed out that the majority's decision conflicts

with decisions of several other circuits and is completely at odds with this Court's *Burns* decision. App., *infra*, 54a.

The question of whether a successor who is later found to have committed unfair labor practices can be required to abide by the predecessor's labor contract is of great economic importance, particularly in these times of recession and economic change. Companies and entire industries that flourished in different times have more recently been failing. If there is to be any chance that they will be revived, new owners must be given the freedom to make necessary changes in restrictive work rules, and they must be assured that they have that freedom. As Judge Easterbrook put it, the Board's decision, enforced by the court of appeals, would "increase the risks of taking over foundering firms, and frustrate the revival of aging plants. Neither American workers nor American consumers will welcome this consequence." *Id.* at 60a.

Nothing could be more fundamental to the operation of the Act than the allocation of the burden of proof in unfair labor practice cases. That is the underlying issue in the second question presented by this petition. Section 10(c) of the Act and this Court's *Transportation Management* decision make it clear that the General Counsel has the burden of proving every element of a *prima facie* case of antiunion discrimination. Only when the General Counsel meets that burden can the question of whether the employer has provided a convincing alternative rationale for its conduct even be posed. But in this case and others, the Board has, as the Second Circuit put it, "misallocat[ed] the burden of proof" and improperly considered the failure of the employer to provide a convincing

rationale for its conduct as part of the General Counsel's *prima facie* case.

I. The Court Of Appeals' Decision Requiring U.S. Marine To Restore Chrysler's Terms Is Inconsistent With This Court's Decision In *Burns*, Conflicts With Decisions Of Other Circuits And Is Plainly Punitive.

In *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), this Court held that although a successor employer may be required to recognize and bargain with the union that represented the predecessor's employees, it is not bound by the provisions of the collective-bargaining agreement in effect between the predecessor and the union. As the Court put it, requiring the successor to assume the obligations of the predecessor's contract " 'would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.' " 406 U.S. at 287 (quoting *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970)).

In addition, requiring a successor employer to assume the predecessor's labor contract would be inconsistent with the economic policies underlying the Act:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions

> of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.

Burns, 406 U.S. at 287-288.

The Court held that, because a successor employer may never involuntarily be bound by the predecessor's union contract, it cannot be said (as a matter of law or logic) to have unilaterally "changed" those terms when it sets new terms at the outset. "It is difficult to understand how [a successor] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and * * * no outstanding terms and conditions of employment from which a change could be inferred." 406 U.S. at 294. But the Court stated in dictum that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. 294-295.

The Court did not define what it meant by the notion that the employer "consult with" the union, and it has not done so since. But although the Court indicated that even under such circumstances the employer would still have the right to "fix[ ] terms," the Board in the ensuing years has interpreted this dictum to require that in cases where it is "perfectly clear" that a successor intends to hire enough of the predecessor's employees to constitute a majority of its workforce, the successor must abide by the terms of the predecessor's labor agreement and cannot change those terms without first bargaining with the

union to an agreement or an impasse. *Howard Johnson Co.*, 198 N.L.R.B. 763, 763-764 (1972), enforced, 496 F.2d 532 (9th Cir. 1974).

The Board has been compelled to acknowledge an exception to its expansive interpretation of the *Burns* dictum. In *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975), the Board held that even when a successor intends to hire substantially all of a predecessor's employees, it will *not* be bound by the predecessor's collective-bargaining agreement when it makes it "clear from the outset" that it intends to impose its own initial terms and conditions of employment. 209 N.L.R.B. at 195. The Board pointed out that a contrary rule would lead to unfortunate results:

> [A]ny interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish – nor do we believe the Court wished – to discourage continuity in employment relationships for such legalistic and artificial considerations.

Ibid. See also Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 778 (1975).

In this case, there is no doubt (and the court of appeals held) that U.S. Marine made it clear from the outset that it intended to set its own initial terms and conditions of employment and intended not to be bound by the Chrysler collective-bargaining agreement. App., *infra*, 5a & 42a n.26. But the court of appeals put a new and unprecedented gloss on the *Spruce Up* doctrine, holding that it applied only in cases where the decision of the successor to set its own initial terms created a "legitimate ambiguity" as to whether it would be able to employ substantially all of the predecessor's former employees (i.e., whether those employees would accept employment under those new terms). *Id.* at 35a. Because "U.S. Marine, *by its illegal activity*, has created any ambiguity as to whether all or nearly all Chrysler employees would have accepted positions," the *Spruce Up* rule did not apply. *Ibid.*

The court of appeals' interpretation of the *Spruce Up* rule is contrary to the principles underlying *Burns*, conflicts with the way other courts of appeals have applied *Burns* and *Spruce Up*, and is indefensible as a matter of federal labor policy. An important part of the *Burns* rationale is that successors often need to make substantial changes in the terms and conditions of employment in order to turn around a moribund company. That is just what happened in this case. Although U.S. Marine's initial terms included *higher* wages than those in effect under Chrysler, the company made other, more important changes in work rules, seniority provisions and other conditions of employment. It is often excessively restrictive work rules, rather than high wages, that prevent

companies from operating effectively and profitably. Therefore the Supreme Court in *Burns* recognized that a successor should have the flexibility, at least at the initial stage, to make changes it believes are necessary in "corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." 406 U.S. at 287-288. The panel decision would "make these changes impossible and [would] discourage and inhibit the transfer of capital." *Id.* at 288. At the very least, the court of appeals' decision will generate a crippling uncertainty as to the ability of successors to make needed changes.

There is simply no way to reconcile the Board's order or the court of appeals' decision with this Court's decision in *Burns*. What the Board and the court did in this case is precisely what this Court prohibited in *Burns*: binding a successor involuntarily to the terms of a predecessor's labor contract. As in *Burns*, it is impossible to understand in this case how U.S. Marine can be "said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and * * * no outstanding terms and conditions of employment from which a change could be inferred." 406 U.S. at 294.

In addition to being contrary to the principles underlying *Burns*, the court of appeals' decision interprets *Burns* and *Spruce Up* in a way that conflicts with several decisions of the Second Circuit and other courts of appeals. In *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980), the successor (Saks) immediately hired 16 of the 18 employees of the predecessor (Gimbels). The Board held that it was "perfectly clear" that Saks intended to hire

substantially all of Gimbels' 18 employees, in large part because Saks was a corporate subsidiary of Gimbels and the latter would have to pay substantial severance pay if the workers were not rehired. See *Saks Fifth Avenue*, 247 NLRB 1047, 1051 (1980). Nevertheless, the court of appeals refused to enforce that part of the Board's order which required Saks to reinstitute Gimbels' terms and conditions of employment, holding that for the "perfectly clear" exception to apply, *two* elements must be met: (1) it must be "perfectly clear that [the successor] plans to retain all the employees in the predecessor unit"; *and* (2) the successor must "hire[ ] those employees in a manner which leads them to believe that they will be hired on the terms and conditions that existed under the predecessor employer." 634 F.2d at 687. In other words, even if it is established that the successor intends to hire all of the predecessor's employees, *Burns* permits it to set its own initial terms if it does so at the outset and does not "misle[ad those] employees into believing that they would be hired on terms identical to those of their [predecessor employer]." *Ibid.*

Similarly, in *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 881 (2d Cir. 1977), the successor "indicated at an early date an intention to retain the whole staff" and, in fact, hired 89% (49 out of 55) of its work force from the prior staff. 549 F.2d at 879, 881. It also informed those employees in advance that it intended to set its own terms and conditions of employment. *Id.* at 877. But it unlawfully refused to recognize or bargain with the union and it also unlawfully refused to hire one predecessor employee because of his prominent support for the union. *Id.* at 878. Under these circumstances, the Second

Circuit refused to enforce the Board's order that the successor reinstate the predecessor's terms. *Id.* at 880-882. "Because Nazareth never at any time led the [predecessor's employees] to believe that they would be retained at the existing terms, it was free to fix the initial terms of employment * * * ." *Id.* at 881. See also *Brotherhood of Railway Clerks v. REA Express, Inc.*, 523 F.2d 164, 171 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975) & 423 U.S. 1073 (1976) (debtor-in-possession regarded as a successor employer; even though it intended to retain the predecessor's employees, it was free to set initial terms as long as it did not lead those employees to believe that they would be retained on the predecessor's terms).

Other circuits have also permitted successors to set their own initial terms when they announce that intention in advance, even under circumstances where there is no ambiguity that the successor expected substantially all of its work force to be former employees of the predecessor. See, *e.g.*, *International Association of Machinists v. NLRB*, 595 F.2d 664, 672-676 (D.C. Cir. 1978); *NLRB v. Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975), enforcing 209 N.L.R.B. 194 (1974). The court of appeals' decision in this case squarely conflicts with these decisions.

The court of appeals attempted to downplay the conflict with the Second Circuit by asserting that "[i]n none of these [other] cases did the Board find that the employer had discriminated against former employees because of their union membership." App., *infra*, 36a n.22. "[A]n employer whose unfair labor practices have created any ambiguity as to whether substantially all of the predecessor's employees would have been retained will not be permitted to profit from the situation." *Ibid.*

But as Judge Easterbrook emphasized in his dissent, that supposed distinction – which is not even factually correct[9] – is absolutely irrelevant to the issue. The court of appeals mistakenly assumed that applicability of the *Spruce Up* rule turns on whether it was "perfectly clear" that the predecessor's employees would accept employment with the successor. In actuality, the rule turns on whether the successor employer has made clear at the outset that it intends to set its own terms.

The Second Circuit holds that even when it is *certain* that a successor intends to hire all of the predecessor's employees, it can set its own terms so long as it does not mislead the employees into believing that they were being hired under the predecessor's terms. The question of whether the employer created any "ambiguity" about its intention to hire all of the workers is of no importance because even if there is *no* ambiguity and it is *certain* that the successor intended to hire all of the workers, the successor can still set its own terms. *Saks & Co. v. NLRB*, 634 F.2d at 687; *Nazareth Regional High School v. NLRB*, 549 F.2d at 881. As Judge Easterbrook put it (App., *infra*, 55a-56a):

> Let us take it as established that, but for its unfair labor practices, U.S. Marine would have hired substantially all of Chrysler's workers. How does this support the Board's order? U.S. Marine would have been free to use its own terms even if it had shouted from the rooftops that it planned to hire every Chrysler employee

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[9] In *Nazareth Regional High School* the Board *did* hold that the employer unlawfully discriminated against at least one prominent union supporter. 549 F.2d at 878.

> who applied. Uncertainty about the number of workers to be hired cannot matter when even perfect knowledge would not support the Board's directive. * * * Had U.S. Marine followed the NLRA to a T, all would have labored on U.S. Marine's terms, not Chrysler's.

Clearly, had U.S. Marine hired the remaining 34 Chrysler workers at the same time it hired the other 223 Chrysler applicants, it still would have been entitled to set its own initial terms. App., *infra*, 57a-58a. The fact that U.S. Marine did *not* hire those 34 – even if unlawful – cannot have any effect on the right of the company to set its own terms. In other circuits, even when it is perfectly clear that the successor intends to hire all of the predecessor's workers, it can still set its own initial terms and conditions of employment if it sets those terms beforehand. Those courts faithfully follow *Burns*. But now, in the Seventh Circuit, a different rule obtains and successors do not have the right to set their own terms, at least not when they have committed unfair labor practices and thus incurred the punitive wrath of the Board.[10]

This Court should grant the petition not only to resolve the conflict among the circuits, but also to return

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[10] As we pointed out below, the Board (and now the court of appeals) has treated U.S. Marine less favorably than other, similarly situated successor employers because U.S. Marine has committed other unfair labor practices. In the Board's own words, U.S. Marine has "forfeited any right [it] may have had as a successor to impose initial terms" because it discriminated against union members. App., *infra*, 72a. But as the dissent points out (*id.* at 52a), that rationale is clearly punitive and beyond the authority of the Board. *NLRB v. Strong*, 393 U.S. 357, 359 (1969); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940).

the Board and the courts to the course set in *Burns*. The Court in *Burns* carefully reviewed the purposes and the history of the Act and concluded that to allow the Board to require a successor to observe the predecessor's terms "would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." 406 U.S. at 287 (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. at 108). In addition, burdening successors with the terms of their predecessors' labor contracts would create "serious inequities" and would discourage efforts to revive failing businesses by making it difficult or impossible for successors to make the changes needed to become profitable. 406 U.S. at 287-288.

In a series of cases decided since *Burns*, the Board has expansively interpreted the "perfectly clear" dictum and has required numerous successors not merely to "initially consult with the employees' representative" but to abide by their predecessors' collective bargaining agreement until they are able to negotiate new ones. But, as the dissent points out in this case, "an obligation to 'consult' does not imply an obligation to use the old terms unless the union agrees to different ones." App., infra, 54a. See also *NLRB v. Bachrodt Chevrolet Co.*, 468 F.2d 963, 971-972 (7th Cir. 1972) (Stevens, J., dissenting and questioning "[w]hether this obligation to 'consult' is the equivalent of an obligation to bargain to impasse"), vacated and remanded, 411 U.S. 912 (1973).

Successors frequently will want to take advantage of the trained work force of the predecessor, and that is certainly to be encouraged. But as *Burns* recognized, the successor may need to make changes in work rules and

other terms to breathe new life into the business. In order to revive a company, it will often be more essential to make "changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision" than to reduce wages. 406 U.S. at 287-288. "Saddling [a successor] employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *Id.* at 288.

In his dissent, Judge Easterbrook recognized the public interest in allowing successors to make needed changes (App., *infra*, 53a; citations omitted):

> A bona fide sale of the business enables the successor to start with its own terms. Change may be the only alternative to consigning the plant to the scrap heap. Denying the successor the right to establish its own wages and other terms whenever it is likely to hire substantially all of the predecessor's workers could prevent this process from occurring and lead to liquidation rather than revivification.

As Justice Stevens put it in his *Bachrodt Chevrolet* dissent, the Court in *Burns* gave effect to the strong "public interest in preserving this freedom for a new owner." 468 F.2d at 971. The Board's approach in this case, as interpreted and enforced by the court of appeals, ignores the great "public benefit in preserving the successor's ability to make immediate operating changes" (*id.* at 973) and would thus make the beneficial process of revivification much more difficult and unlikely.

This Court should grant the petition to preserve the interests underlying *Burns*. In these times of economic

change and restructuring, it is especially important that new owners be given the opportunity to try to turn around "moribund businesses."

II. The Court Of Appeals' Decision Requiring U.S. Marine To Hire 34 Former Chrysler Workers Because It Failed To Provide A Convincing Rationale For Not Hiring Them Is Inconsistent With This Court's Decision In *Transportation Management*, Contrary To Section 10(c) Of The Act, And In Conflict With The Second Circuit

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), this Court held that under Section 10(c) of the Act, the NLRB General Counsel has the burden of proving that antiunion discrimination "was a substantial or motivating factor" in the particular employment decision. "[T]hroughout the proceedings, the General Counsel carries the burden of proving the elements of an unfair labor practice." *Ibid.* A showing of antiunion animus alone is not enough to prove unlawful discrimination. An employer "does not violate the NLRA * * * if any antiunion animus that he might have entertained did not contribute" to the employment decision. *Id.* at 398.

In this case, the court of appeals enforced the Board's order requiring U.S. Marine to hire the 34 former Chrysler workers even though there was "no real, substantive, evidence that [U.S. Marine's] refusal to hire the 34 was based upon their union membership or upon their former employment with Chrysler." App., *infra*, 127a-128a. Indeed, the Board emphasized the administrative law judge's finding that there was "no substantive evidence of why one person was hired and one was not." *Id.* at

68a.[11] The Board's order was based on a generalized finding of antiunion animus and discriminatory intent (*id.* at 67a-68a), coupled with the failure of U.S. Marine to demonstrate "legitimate reasons for the refusal to hire the 34 former Chrysler employees." *Id.* at 68a. The Board improperly placed the burden on U.S. Marine to show "a convincing rationale for [its] refusal to hire the predecessor's employees" (*id.* at 67a) and to show that its employment decisions were *not* based on antiunion motivation.

The Board expressly considered the failure of U.S. Marine to prove why it had not hired the 34 as an element in the General Counsel's *prima facie* case of antiunion discrimination. App., *infra*, 66a-67a. In doing so, the Board followed the analytical framework it had set out in *Lemay Caring Center*, 280 N.L.R.B. 60 (1986), enforced, 815 F.2d 711 (8th Cir. 1987). The court of appeals – citing *Lemay Caring Center* and referring to the "[l]ack of convincing rationale" and the inability of U.S. Marine to "explain the[ ] rejections" as factors supporting the General Counsel's *prima facie* case – applied the same framework. App., *infra*, 21a-22a.

The court of appeals' decision in this regard cannot be reconciled with the decision of the Second Circuit in *Holo-Krome Co. v. NLRB*, ___ F.2d ___, 138 L.R.R.M. 2661 (1991). In *Holo-Krome*, the Board found "that the General Counsel's showing of unlawful motivation is also supported by the Respondent's failure to give a credible

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[11] That finding led the ALJ to conclude that U.S. Marine could *not* be required to hire the 34. As he put it, the company could not "be put to the test of carrying forward the burden of proving that [its] hiring process did not discriminate against the 34 alleged discriminatees." App., *infra*, 131a-132a.

explanation for its reasons for refusing to hire [the employees]." 302 N.L.R.B. No. 71, slip. op. at 5 (1991). The Second Circuit held that this approach – identical to that used in present case – represented a "misallocation of the burden of proof * * * ." 138 L.R.R.M. at 2664. The court held that the Board improperly "considered the weakness of rebuttal evidence * * * to find that the General Counsel established a *prima facie* case. * * * [T]his approach is not only counterintuitive, it negates the established *Wright Line* rule." *Id.* at 2663-2664.[12]

The Second Circuit's decision is faithful to the teaching of *Transportation Management* that the General Counsel has the burden of proving antiunion motivation. The General Counsel cannot base his finding of unlawful motivation solely on a generalized finding of antiunion animus or intent to avoid unionization, and he cannot rely on the failure of the respondent to disprove discrimination as part of his *prima facie* case. 462 U.S. at 398. To allow him to do so would negate the requirement of the Act that the General Counsel prove his case by the preponderance of the evidence.

It is impossible to reconcile the Second Circuit's *Holo-Krome* decision with that of the Seventh Circuit in this case. The Second Circuit clearly would have denied enforcement of the Board's order here because the Board considered the failure of U.S. Marine to provide a "convincing rationale" for its refusal to hire the 34 as an important element in the General Counsel's *prima facie* case. App., *infra*, 67a. This Court should grant the petition

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[12] *Wright Line* is the Board decision that established the rule later enforced in *Transportation Management*. See 462 U.S. at 395.

to resolve the conflict among the circuits and to make it clear that Section 10(c) of the Act requires the General Counsel to prove unlawful motivation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December, 1991

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 89-2051, 89-2140 and 89-2152

U.S. MARINE CORPORATION and
BAYLINER MARINE CORPORATION,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL UNION, ALLIED INDUSTRIAL
WORKERS OF AMERICA, AFL-CIO, et al.,

Intervening Respondent.

INTERNATIONAL UNION, ALLIED INDUSTRIAL
WORKERS OF AMERICA, AFL-CIO, et al.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Argued December 5, 1989 – Decided October 18, 1990

Reheard en banc
June 11, 1991 – Decided September 25, 1991

BAUER, *Chief Judge*, and CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

RIPPLE, *Circuit Judge*. U.S. Marine Corporation, Bayliner Marine Corporation, and the International Union, Allied Industrial Workers of America, AFL-CIO, seek review of an order of the National Labor Relations Board (the Board); the Board seeks enforcement of that order. For the following reasons, we deny the petitions for review and enforce the order.

I

BACKGROUND

A. The Board's Findings of Fact[1]

This successorship case involves the rights and responsibilities of U.S. Marine Corporation and its parent company, Bayliner Marine Corporation, as a result of their purchase of Chrysler Marine Corporation. The issues presented on appeal require a plenary statement of the facts. To facilitate the reader's understanding of the factual background of the case, we shall subdivide our

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[1] Following a "careful[ ] examin[ation of] the record," the Board adopted the Administrative Law Judge's (ALJ's) findings of fact and credibility determinations. Board Decision and Order (D&O) at 1 n.1.

presentation of the facts into three headings: (1) the purchase by Bayliner; (2) the hiring process of U.S. Marine; and (3) the post-purchase labor-management relations of U.S. Marine and the Union. However, we also forewarn the reader that, at a later point in the analysis, a strict chronological understanding of events, necessarily sacrificed somewhat by the format described, will be necessary.

1. The purchase by Bayliner

Chrysler Marine Corporation (Chrysler), a subsidiary of the Chrysler Corporation, manufactured marine and industrial engines from 1965 until 1984 at a facility in Hartford, Wisconsin. In 1983, the parent company decided to sell Chrysler and entered into negotiations with Bayliner Marine Corporation (Bayliner) for the sale of the Hartford facility. Chrysler and Bayliner signed a letter of intent, subject to the negotiation of specific terms, on October 20, 1983. In anticipation of the transaction, the stockholders and directors of Bayliner organized U.S. Marine Corporation on December 5, 1983 as a vehicle to purchase Chrysler.[2] James W. Hoag, Bayliner's vice-president of administration, was assigned to be general

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[2] Bayliner is owned by J. Orin Edson (chairman), Vinton H. Sommerville (president), David Livingston (vice-president), and Donald Saunders (secretary-treasurer). U.S. Marine Corporation is also owned by J. Orin Edson (president), Vinton H. Sommerville (treasurer), David Livingston (vice-president), and Donald Saunders (secretary). Unless the context requires otherwise, Bayliner and U.S. Marine Corporation will be referred to collectively as U.S. Marine.

manager and chief operations officer of the Hartford plant once the purchase was completed. He also was responsible for hiring new employees to staff the plant.

During the time that Chrysler owned the Hartford facility, the International Union, Allied Industrial Workers of America, AFL-CIO, and Local 879 (the Union) represented Chrysler's production and maintenance employees.[3] The fate of these employees was a significant issue throughout the course of negotiations between Chrysler and U.S. Marine. Chrysler repeatedly sought assurances that U.S. Marine would hire Chrysler's employees. However, U.S. Marine made it clear to the Union, Chrysler, and Chrysler's employees that it (1) would hire only the most qualified applicants, irrespective of whether they formerly worked for Chrysler, although former Chrysler workers were encouraged to apply, (2) anticipated hiring at least eighty-five per cent of the former Chrysler employees, (3) would not recognize the Union, and (4) planned to hire its employees under its own wage plan and working conditions and therefore would not observe the terms and conditions of employment in effect under Chrysler. James Hoag specifically advised several Union officials at a meeting on December 13, 1983 that he "had no intention of recognizing the union," "wanted no part of the contract [between Chrysler and the Union]," and "was too busy to sit down and meet with the union." Tr. at 691, 692.

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[3] The most recent collective bargaining agreement between the Union and Chrysler was in effect from July 1, 1983 to June 30, 1984.

The Union reacted to this information by seeking to enjoin the sale of Chrysler to U.S. Marine. The Union sought the injunction on the ground that the sale would violate the Union's collective bargaining agreement, which required Chrysler to give the Union six months notice of the closing of the Hartford facility and negotiate a severance pay plan. *See Local 879, Allied Indus. Workers v. Chrysler Marine Corp.*, 819 F.2d 786, 787 (7th Cir. 1987). On December 27, 1983 and in response to the lawsuit, Chrysler's associate general counsel requested J. Orin Edson, who was Bayliner's chairman and U.S. Marine Corporation's president, to testify or file an affidavit that U.S. Marine Corporation would hire a majority of the Chrysler employees. Mr. Edson refused, indicated that the company would not make a commitment regarding hiring, and in fact expected to hire less than fifty per cent of the Chrysler workers. Although Mr. Edson refused to accede to Chrysler's request, he authorized Mr. Hoag to file an affidavit. In his affidavit of December 28, 1983, Mr. Hoag stated that (1) U.S. Marine had begun accepting applications and expected to have a representative complement of employees hired by early January, 1984, (2) applicants would be considered based on their relative qualifications, (3) union membership (or the lack thereof) would not enter into the hiring decision, (4) he believed a number of applicants would be former Chrysler employees and that such prior experience would be advantageous, and (5) applicants would receive an explanation of the terms and conditions of employment prior to being hired. The district court granted a preliminary injunction, but this court granted a stay on January 9, 1984 and eventually reversed the injunction on May 31,

1984. After the injunction was lifted, the transfer of the facility was finalized. On Friday, January 13, 1984, Chrysler completed the sale to U.S. Marine, laid off its entire work force of 262 production and maintenance employees, and closed its doors.

2. The hiring process of U.S. Marine

From Monday, January 16 through Friday, January 20, the company interviewed some 500 applicants and hired new employees. On January 20, after the first week of hiring was completed, the company's accounting department projected that U.S. Marine would require 396 employees actually on the job by June. This figure was based on information supplied by the company's manufacturing and marketing departments and did not reflect anticipated absentee rates. According to John Lombardo, U.S. Marine's human resources manager, U.S. Marine wanted to reopen the plant as quickly as possible. He further testified that in order to do so, the company required a skilled labor force composed of employees who had experience in the particular operations. Consequently, on Monday, January 23, U.S. Marine reopened the plant with a staff of 219 workers, all of whom were former Chrysler employees.

U.S. Marine continued to hire employees throughout the month of January. By January 25, the company had hired a total of 231 workers, 222 of whom were former Chrysler employees. Between January 25 and January 30, thirty more employees were hired, only one of whom had worked for Chrysler. Thus, on January 30, 1984, the last day a former Chrysler employee was hired, the U.S.

Marine work force was composed of 261 production and maintenance employees, 223 of whom had worked previously for Chrysler.

Nearly all of the 262 former Chrysler workers had applied with U.S. Marine; of those who applied, U.S. Marine hired all but thirty-four.[4] There was a great deal of testimony concerning the skill level and versatility of the thirty-four former Chrysler employees not hired by U.S. Marine.[5] All of these workers had at least ten years seniority with Chrysler, but they never were informed why they had not been hired. After January 30, 1984, U.S. Marine did not hire any of the remaining Chrysler applicants, although its work force increased to as many as 323 employees. In sum, from January 23 to August 31, 1984, U.S. Marine's total employment ranged from 219 to 323 production and maintenance employees. During that time period, the number of former Chrysler employees ranged from 218 to 223.

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[4] Of the 262 former Chrysler employees, 258 applied for jobs with U.S. Marine. Of those 258 applicants, 223 were hired and 35 were rejected. In February 1985, one applicant died, leaving 34 predecessor employees at issue.

[5] The ALJ heard testimony from 12 of the 34 former Chrysler employees. Following the testimony of the twelfth witness and in the absence of any objection, the ALJ concluded that the remaining 22 witnesses also would testify that they had good work records and were versatile employees. The ALJ invited rebuttal from U.S. Marine on the issue and declined to take further testimony from the remaining witnesses.

3. Post-purchase labor-management relations of U.S. Marine and the Union

After it began operating the plant, U.S. Marine refused to discuss grievances with Union representatives during company time. The company also removed Union bulletin boards from the plant. At the same time, the company established a "Safety and Progress Committee" composed of senior management employees and representatives from each work area. The Committee was designed as an open forum where employees could raise complaints and discuss all problems or areas in need of change; no subject was off-limits for discussion. The Committee met during work hours, and employee participants were paid for their time.

On January 25, 1984, two days after the plant began operations under new management, at a time when 222 of the 231 U.S. Marine employees were former Chrysler workers, the Union requested recognition. The Union also asked that U.S. Marine furnish a list of names, addresses, job titles, and wage rates of all U.S. Marine employees and copies of all written manuals and handbooks describing the benefits then provided by U.S. Marine. The company, which was still involved in the hiring process, did not give the Union an immediate response.

On or shortly after January 31, 1984, after the Union had requested recognition and after the last Chrysler employee was hired, Mr. Hoag personally modified the accounting department's manpower projection figure from 396 to 460 workers required by June. This modification allegedly was based on an increased production

schedule and the absenteeism rate experienced by Chrysler in 1983. Before determining the manpower projection, however, Mr. Hoag increased the company's estimated production schedule by forty engines for May of 1984 and ninety engines for June. He was unable to explain the basis of this increase. Moreover, the absentee rate used by Mr. Hoag reflected the fact that Chrysler employees would have been entitled to lengthy paid vacations; in 1984, U.S. Marine employees would not have been entitled to any paid vacation.[6]

When the company had not yet responded to the Union's recognition request on February 2, 1984, the Union filed an unfair labor practice charge alleging that U.S. Marine unlawfully had refused to bargain. The Board subsequently sought a temporary injunction pursuant to section 10(j) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(j). U.S. Marine defended its refusal to recognize and bargain with the Union on the grounds that it did not expect to have a full complement of employees until June 1984, that the full complement would consist of 460 employees, and that there was no legal obligation to recognize the Union because less than half of those 460 were expected to be former Chrysler employees. On May 10, 1984, the district court granted the Board's petition. The court ordered U.S. Marine to

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[6] A subsequent projection, prepared by U.S. Marine's accounting department on February 15, 1984, took into consideration an expected absentee rate lower than that used by Mr. Hoag. This schedule indicated that U.S. Marine would require only 380 employees by June of 1984.

recognize and bargain with the Union and to supply the information that the Union had requested on January 25.

Following issuance of the temporary injunction, U.S. Marine continued to hold Safety and Progress Committee meetings and to respond to employee requests stemming from those sessions. Based on this conduct, U.S. Marine was found in contempt of the injunction. *See Szabo v. U.S. Marine Corp.*, 819 F.2d 714 (7th Cir. 1987). The company also recognized and began meeting with the Union. Between May 24, 1984 and October 25, 1985, U.S. Marine and Union officials met a total of nineteen times. U.S. Marine refused to conduct these bargaining sessions at the facility or on company time. As a result, the meetings took place after work hours at the Union headquarters, located approximately forty minutes from the plant. On October 25, 1984, U.S. Marine presented a contract proposal to the Union. The Union rejected the proposal, at which point U.S. Marine declared that it was at an impasse with the Union on several issues. The Union objected, stated that it wanted to negotiate further, and suggested meeting with a mediator. Mr. Hoag declined that invitation on behalf of the company. No further meetings took place between U.S. Marine and the Union, although the Union requested bargaining over holiday layoffs. On January 21, 1985, U.S. Marine implemented the contract it had proposed to the Union on October 25, 1984. A pay raise was included within that contract.

B. Administrative Proceedings

1. The Administrative Law Judge's conclusions

Based on these facts, the Administrative Law Judge (ALJ) determined that Bayliner and U.S. Marine Corporation constitute a single employer and that U.S. Marine, as the successor to Chrysler, had engaged in numerous unfair labor practices. Specifically, the ALJ concluded that the company violated section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize the Union, refusing to furnish the Union with certain information, bargaining in bad faith with the Union, unilaterally implementing changes in terms and conditions of employment without first bargaining in good faith with the Union, bargaining individually with employees, and establishing and bargaining with the Safety and Progress Committee.

With regard to the charge that U.S. Marine had violated section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire thirty-four of the former Chrysler workers, the ALJ determined that these applicants had not been subjected to discrimination. In the ALJ's view, even considering the company's established antiunion animus and the fact that no former Chrysler employees were hired after January 30, 1984, nothing in the evidence indicated why those applicants had not been hired. The ALJ reasoned that the demonstrated unfair labor practices could support a section 8(a)(3) violation if there was a "junction point" between U.S. Marine's hostility to the Union and the company's

hiring process. The ALJ was unable to find such an intersection and therefore found that the evidence did not support the unfair labor practice charge.

The ALJ apparently reasoned that the section 8(a)(3) charge could be supported only by a finding that Mr. Hoag accepted the 460 manpower figure as a real goal; if Mr. Hoag so believed, he then would be motivated to stop hiring former Chrysler employees so that the U.S. Marine work force consisted of a non-union majority. However, the ALJ already had concluded that Mr. Hoag did not truly believe the 460 manpower projection figure and that, consequently, Mr. Hoag would have no incentive for refusing to hire additional Chrysler employees. Therefore, in light of what the ALJ believed was an "inherent conflict," and, in the absence of substantive evidence of the company's motivation, the ALJ declined to hold that U.S. Marine's hiring decisions were motivated by antiunion animus or the desire to avoid a duty to bargain.

Having found that U.S. Marine violated section 8(a)(5) and (1), as set forth above, the ALJ recommended that the company be ordered to cease and desist from unilaterally changing the terms and conditions of employment without first bargaining with the Union, bargaining individually with employees, and bargaining or meeting with the Safety and Progress Committee. The ALJ also recommended that the company be ordered to recognize and bargain with the Union and furnish the

Union with certain information. Finally, the ALJ's recommended order included a visitorial clause.[7]

2. The Board's conclusions

The Board unanimously affirmed the ALJ's conclusion that U.S. Marine committed the enumerated section 8(a)(5) violations. The Board also upheld the ALJ's determination that James Hoag falsely inflated U.S. Marine's employee projections. However, contrary to the ALJ's finding, the Board concluded that U.S. Marine violated section 8(a)(3) of the Act by failing to hire thirty-four former Chrysler employees. The ALJ had been unable to find a nexus between the company's antiunion animus

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[7] Such clauses "permit the Board to examine the books and records of a respondent and to take statements from its officers and employees and others for the purpose of determining or securing compliance with a court-enforced order." *Cherokee Marine Terminal*, 287 N.L.R.B. No. 53, 128 L.R.R.M. (BNA) 1051, 1052 (1988). The ALJ's recommended visitorial clause in this case read as follows:

> For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondents, their officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

Administrative Law Judge's Decision (ALJD) at 35.

and its failure to hire these applicants. The Board, however, found that the requisite nexus lay in the fact that "[t]he end sought to be achieved by the false 'full complement' figure," evasion of a bargaining obligation as Chrysler's successor, "would be frustrated if the former Chrysler employees constituted more than half of that figure." Board Decision & Order (D&O) at 7-8. Once the manpower projection falsely was set at 460,

> it became imperative that [U.S. Marine] hire fewer than 231 former Chrysler employees, or the 460 figure would become meaningless as a defense to the Union's recognitional claim. Thus, the sham inflation of the full-complement projection and the decision to stop rehiring former Chrysler employees once their number had reached 223 are complementary aspects of the same scheme sought to be carried out by U.S. Marine.

Id. at 5-6. The Board noted that the ALJ's failure to find a section 8(a)(3) violation was based on the ALJ's mistaken assumption that Mr. Hoag would "proffer the 460 figure as a defense to recognition, and then not take this figure into account in making his hiring decision." *Id.* at 8. Accordingly, the Board concluded that U.S. Marine refused to hire the Chrysler applicants in an unlawful attempt to avoid a bargaining obligation.

With regard to the remedy, the Board accepted the ALJ's recommendations with the exception of the visitorial clause. The Board's order did not include such a clause. It acknowledged the ALJ's recommendation but summarily rejected it, stating, "[w]e find no need for such a remedial provision here. *See Cherokee Marine Terminal,*

287 NLRB No. 53 (Jan. 28, 1988)." D&O at 13 n.14. In addition to the ALJ's recommendations, the Board ordered U.S. Marine to preserve and make available all records necessary to analyze the amount of back pay due. The Board also ordered the company to reimburse employee members of the Union's negotiating committee for wages lost while attending negotiating sessions. The Board did not address the Union's additional requests for legal costs and referral of the case to the Justice Department.

The most significant difference between the Board's order and the ALJ's recommended order was based on the Board's conclusion that U.S. Marine unlawfully refused to hire thirty-four former Chrysler employees. To remedy that conduct, the Board modified the ALJ's decision and ordered the company to offer employment, with back pay and benefits, to those thirty-four applicants. Over one dissent, the Board also directed U.S. Marine to reinstate the terms and conditions of employment that were in effect under Chrysler's management of the Hartford facility.[8]

II ANALYSIS

A. Standard of Review

We have jurisdiction to hear this appeal pursuant to 29 U.S.C. § 160(e), (f). Our standard of review is governed

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[8] Because NLRB Member Cracraft concluded that this issue was not fully litigated, she dissented, on due process grounds, from the decision to reinstate the previous terms and conditions of employment.

by statute and set forth in 29 U.S.C. § 160(e). Specifically,

> [o]n review, the Board's factual findings are 'conclusive' if they are supported by 'substantial evidence on the record as a whole.' Section 10(e) of the Act, 29 U.S.C. § 160(e). The Board's application of the law to particular facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had it considered the matter *de novo*.

Indianapolis Power & Light Co. v. NLRB, 898 F.2d 524, 529 (7th Cir. 1990); *see also NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "This standard of review is not modified in any way when the Board and the ALJ disagree as to legal issues or derivative inferences made from the testimony." *Weather Shield Mfg., Inc. v. NLRB*, 890 F.2d 52, 57 (7th Cir. 1989). It is the independent validity of the Board's order that is under review. *Id.* We emphasize that, on review, the court may not displace the Board's determinations simply because a different conclusion could be reached if the court reviewed the case *de novo*. *United Ins. Co.*, 390 U.S. at 260; *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1184 (7th Cir. 1990).

"Moreover, we must 'recognize the Board's special function of applying the provisions of the Act to the complexities of industrial life.' " *Id.* (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)). We must remember that Congress has charged the Board with "the task of devising remedies to effectuate the policies of the Act."

NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); see 29 U.S.C. § 160(c). Thus, " '[i]t is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged.' " *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944) (quoting *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940)). The Board's authority to fashion remedies "is a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Courts may not disturb the Board's remedial order " 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)); *accord NLRB v. Manitowoc Eng'g Co.*, 909 F.2d 963, 970 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 954 (1991). The faithful application of these principles requires a great deal of judicial restraint. We must accept as a "given" the economic and social policy choices made by Congress in enacting the National Labor Relations Act. We must acknowledge that Congress has decided to vest primary responsibility for the implementation of that policy in the NLRB and not in this court.

B. Issues Presented

As a threshold matter, we also state what is . . . and what is not . . . contested in this appeal. U.S. Marine does not appeal the Board's determinations that

(1) U.S. Marine Corporation and Bayliner constitute a single employer,

(2) U.S. Marine is a successor employer to Chrysler,

(3) U.S. Marine violated section 8(a)(5) and (1) of the Act by

(a) refusing to recognize and furnish certain information to the Union,

(b) failing to bargain in good faith with the Union,

(c) unilaterally implementing changes in terms and conditions of employment,

(d) bargaining individually with employees, and

(e) establishing and bargaining with an employer-dominated labor organization (the Safety and Progress Committee).

Accordingly, the Board's order with respect to these issues is enforced. *See Montgomery Ward & Co. v. NLRB*, 668 F.2d 291, 304 (7th Cir. 1981) (uncontested violations of the Act summarily enforced); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1076 (7th Cir. 1981) (same). We also note that these uncontested violations "do not disappear by not being mentioned in a brief. They remain, lending their aroma to the context in which the [remaining] issues are considered." *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982).

Before this court, the company challenges the Board's conclusion that U.S. Marine violated the Act by refusing discriminatorily to hire thirty-four former Chrysler employees. The company also challenges the Board's order that U.S. Marine remedy this violation by offering

to hire the thirty-four former Chrysler employees with back pay. Finally, the company contests the Board's order that U.S. Marine reinstitute the terms and conditions of employment that were in effect under Chrysler. We examine whether the Board's conclusions on these issues are supported by substantial evidence. We also consider the Union's claims concerning the appropriateness of the Board's remedial order.

C. Hiring of Former Chrysler Employees

We begin by reviewing the Board's determination that U.S. Marine violated section 8(a)(3) and (1) of the Act by refusing to hire thirty-four former Chrysler employees. In order to prove a violation of the Act, the Board's General Counsel must establish, by a preponderance of the evidence, that the alleged unfair labor practice was motivated by antiunion sentiment. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398-99, 401 (1983). Motive may be demonstrated by either direct or circumstantial evidence.[9] As noted above, on review before this court, the Board's conclusion that an employer acted with a discriminatory motive is conclusive if supported by substantial evidence. Once it is shown that

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[9] See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941) (Board properly relied on circumstantial evidence of discrimination; lack of direct evidence of employer's discriminatory motive did not require denial of relief); *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 626 (7th Cir. 1981) ("Motivation is a question of fact to be determined by the Board from consideration of all the evidence and in making this determination the Board is free to rely on circumstantial, as well as direct evidence.").

antiunion animus was a motivating factor in the employer's conduct, the employer will be held to have violated the Act unless it demonstrates, as an affirmative defense, that it would have made the same decisions even absent the prospective employee's union activities. *Id.* at 401-03.[10]

The basic applicable substantive principles of federal labor law are beyond dispute. When a new employer acquires a business, it is free, as a general rule, to determine the initial terms and conditions of employment. *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287-88 (1972). Nevertheless, if the new employer continues the predecessor's business in substantially unchanged form, and if a majority of the work force was formerly employed by the predecessor, the successor has an obligation "to bargain with the union that represented those employees." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 47 (1987). Although there is no obligation to hire the predecessor's employees, a successor violates section 8(a)(3) of the Act if it makes discriminatory hiring decisions and refuses to employ its predecessor's employees in order to avoid incurring a bargaining obligation. *See id.*

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[10] This test concerning the respective burdens of proof in a labor case was developed by the Board in *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved this formula. U.S. Marine claims that the Board misapplied the *Wright Line* test because: (1) the Board's General Counsel failed to establish a *prima facie* case, and (2) assuming *arguendo* that the General Counsel succeeded in making a case, U.S. Marine met its burden of rebuttal.

at 40; *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees*, 417 U.S. 249, 262 n.8 (1974); *Burns*, 406 U.S. at 280 n.5; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182-87 (1941).

The Board determined that U.S. Marine refused to hire thirty-four of Chrysler's former employees in order to avoid having to bargain with the Union. Accordingly, the Board concluded that the company had violated section 8(a)(3) of the Act. In reaching this conclusion, the Board employed the analytical pattern set forth in *Dasal Caring Centers*, 280 N.L.R.B. 60, 69 (1986), *enforced without opinion*, 815 F.2d 711 (8th Cir. 1987). Despite its overlapping inquiries, this approach can serve as a useful guide in determining whether a successor employer has engaged in discriminatory hiring practices designed to avoid the obligation to bargain with an incumbent union:

> it must be established that there is substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; as well as a reasonable inference from the evidence that Respondent conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of Respondent's overall work force to avoid the Board's successorship doctrine.

Id. In this appeal, it is our duty, as we have noted already, not to determine this matter *de novo* but to decide whether the Board's conclusion is supported by substantial evidence on the record taken as a whole. *See supra* pp.

12-13. In reviewing the Board's conclusion, we shall follow the analytical pattern developed in *Dasal Caring Centers* – not as a rigid formula but as a guide to our evaluation of the evidence relied upon by the Board.

1. Substantial evidence of antiunion animus

We need to devote little space to this matter. The record amply demonstrates that, from the very beginning of its negotiations with Chrysler for the sale of the business, Bayliner made it clear that it would not deal with the Union. Indeed, the best evidence of antiunion animus on the part of U.S. Marine can be found in the violations of the Act not contested on this appeal. *See supra* p. 14.

2. Lack of convincing rationale for refusal to hire the predecessor's employees

The record establishes, as the ALJ determined and the Board upheld, the absence of any legitimate reason for U.S. Marine's refusal to hire thirty-four former Chrysler employees. Based on the testimony, the ALJ determined that the applicants who were turned down were good employees, were versatile and skilled in various jobs at the plant, had worked at the plant a minimum of ten years, and had work-related characteristics comparable to the 223 former Chrysler employees who were hired. Nevertheless, they were rejected while more than one hundred other applicants were hired; U.S. Marine was unable to explain these rejections to either the applicants (none was told why he had been passed over) or to the Board. Indeed, " 'there is no substantive evidence of why one person was hired and one was not hired.' " D&O

at 7 (quoting Administrative Law Judge's Decision (ALJD) at 22).[11]

3. Inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive

There is substantial evidence, both direct and circumstantial, from which the Board could infer that thirty-four of the applicants were not hired because they were union members who formerly had worked for Chrysler. As a threshold matter, we note that central to this conclusion is the Board's determination that Mr. Hoag falsely inflated the projected work force figures in order to avoid the obligation to negotiate with the Union. The ALJ pointedly noted that the accuracy of the manpower requirement figures relied on by the company to defend its conduct turns

> entirely upon *Hoag's personal credibility*. Hoag is not an engineer, nor a production manager, but a lawyer, involved at Bayliner with human resources and administration, not marketing, sales, or production. As noted, there is no corroborating evidence from Bayliner, or U.S. Marine, or independent sources, of why Hoag decided that 40 additional engines would be

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[11] U.S. Marine maintains that this finding conclusively precludes any determination that the company discriminated against 34 applicants because they were Union members who formerly worked for Chrysler. The point of this statement, however, is that the company's unlawful scheme to avoid a bargaining obligation was furthered by the refusal to hire some of the former Chrysler employees, not by the refusal to hire those specific applicants.

> built in May of 1984 and 90 more in June . . . . Further, Hoag's projections on absentee rates . . . were manifestly inaccurate. [Based on Hoag's selective memory and inconsistent explanations,] I do not credit Hoag's explanations of his motives in revising the U.S. Marine estimates of production and manpower needs . . . .

ALJD at 17-18 (emphasis supplied). Like the Board, we shall not disturb the ALJ's decision that Mr. Hoag's testimony lacked credibility. *See Roadmaster Corp. v. NLRB*, 874 F.2d 448, 453 n.4 (7th Cir. 1989). There is more than ample evidence – especially when the entire course of the parties' dealing is analyzed – to support the Board's determination that the company's "central concern was to avoid a bargaining obligation by means of reliance on a false full-complement projection." D&O at 5. Mr. Hoag, who was responsible for hiring U.S. Marine's employees, admitted that he was aware before the hiring process began that any bargaining obligation turned on whether former Chrysler employees constituted more than half of U.S. Marine's work force; the company – and Mr. Hoag specifically – made clear to the Union, Chrysler, and its employees that the Union would not be recognized and the collective bargaining agreement would not be followed. Although Mr. Hoag originally stated in December of 1983 that the company expected to have a representative complement of workers early in January of 1984, he later altered the manpower figures and thereafter defended U.S. Marine's refusal to recognize the Union on the ground that the Company would not have a full

complement of workers until June of 1984.[12] Moreover, the company's president indicated that U.S. Marine expected to hire less than fifty per cent of the former Chrysler workers.[13] This announcement was made before any of the Chrysler employees had been interviewed or considered for employment and was made in conjunction with the company's statement that it would not recognize or bargain with the Union. The company then did refuse to honor the Union's recognition request, based on Mr. Hoag's false projections, in spite of the fact that, from the time U.S. Marine took over the Hartford plant until September 16, 1985, the day the unfair labor practice hearing began, former Chrysler employees always constituted a majority of the U.S. Marine work force. Moreover, after the Union requested recognition and filed the unfair labor practice charge, U.S. Marine continued to hire new employees but declined to hire any of the thirty-four comparably qualified former Chrysler employees. Supported by this evidence and the manner in which Mr. Hoag developed the 460 figure,[14] the Board reasonably could conclude that there was antiunion animus and that Mr. Hoag was motivated by a desire to furnish U.S. Marine with a defense to the Union's recognition request.

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[12] *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 46-47, 52 (1987) (successor's duty to bargain is triggered when successor has hired a "substantial and representative complement" of its total work force and a majority of those hired worked for the predecessor).

[13] Of course, this expectation was not borne out; 98% of the former Chrysler employees applied for a job with U.S. Marine, and the company hired approximately 86% of those who applied.

[14] As set forth more fully in the statement of the facts, Mr. Hoag modified the employee projection figure based on an

(Continued on following page)

4. Intent to avoid the successorship doctrine

The last part of the *Dasal* analysis – necessarily cumulative of the first three inquiries – focuses on whether the Board reasonably could infer that U.S. Marine conducted its hiring process to preclude Chrysler's employees from being hired as a majority of the overall work force in order to avoid a bargaining obligation as Chrysler's successor. U.S. Marine maintains that "no unlawful purpose would have been served by not hiring 34 of the former Chrysler employees." Appellants' Br. at 19. To the contrary, once the manpower projection falsely was set at 460,

> it became imperative that [U.S. Marine] hire fewer than 231 former Chrysler employees, or the 460 figure would become meaningless as a defense to the Union's recognitional claim. Thus, the sham inflation of the full-complement projection and the decision to stop rehiring former Chrysler employees once their number had reached 223 are *complementary aspects of the same scheme* sought to be carried out by U.S. Marine.

D&O at 5-6 (emphasis supplied). Accordingly, the unlawful purpose of avoiding a bargaining obligation could have been served *only* by not hiring more of the Chrysler

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(Continued from previous page)

increased production schedule and Chrysler's 1983 absenteeism rate. However, without explanation, Mr. Hoag also increased the company's estimated production. Moreover, Mr. Hoag used an absentee rate that was based on Chrysler's benefits plan, a plan that obviously did not apply to U.S. Marine employees.

applicants: to maintain a colorable defense against the Union's request for recognition, U.S. Marine had to keep the number of Chrysler workers at less than fifty per cent of its anticipated work force. *See Fall River Dyeing*, 482 U.S. at 46-47; *Burns*, 406 U.S. at 277-81. Thus, in light of the evidence regarding the company's antiunion animus, it was permissible for the Board to conclude that U.S. Marine conducted the hiring process in a manner designed to preclude Chrysler's employees from being hired as a majority in order to avoid a bargaining obligation. *See NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 626 (7th Cir. 1981) (Board properly relied on employer's manifest hostility toward unionization combined with knowledge of employee's union activity to support finding of section 8(a)(3) violation).

U.S. Marine contends that the Board erred in finding a section 8(a)(3) violation. The company argues that it is "critical" that the manpower projections were not altered by Mr. Hoag until *after* the thirty-four former Chrysler employees' applications had been rejected. Appellants' Br. at 19-20. However, Mr. Hoag and Joy Mueller, U.S. Marine's employment supervisor, testified that the thirty-four applicants were not in fact rejected but remained under consideration throughout the hiring process.[15] More fundamentally, the company's reliance on this point

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[15] Also, applicants who inquired about the status of their applications were told that they were still under consideration, and the Union was informed as late as July of 1984 that the 34 applicants remained under consideration. This is consistent with the applicants' testimony that they never were informed why they had not been hired.

is misplaced because the sequence of Mr. Hoag's manipulation of the manpower figure and the decision to stop hiring former Chrysler employees is largely irrelevant. There is substantial evidence that U.S. Marine's desire to avoid a bargaining obligation predated its purchase of the plant. If the employee projections had been made earlier in the hiring process, the goal of keeping former Chrysler workers at less than half of the total U.S. Marine work force still could have been reached by refusing employment to a greater number of the Chrysler applicants. Consequently, the fact that Mr. Hoag inflated the figure *after* he knew that the rather disorganized hiring process had resulted in 223 former Chrysler workers having been hired – and therefore knew that the employee projection had to be at least 447 (twice 223 plus one) – is not controlling. However, it is chronologically significant that Mr. Hoag altered the manpower projections after the Union had requested recognition.

Although the ALJ was unable to find consistent theories to support both U.S. Marine's refusal to recognize the Union and the company's alleged discriminatory hiring practices, the Board reasonably concluded that U.S. Marine's unlawful motivation led to the company's refusal to hire some of the Chrysler applicants. Based on its conclusion that Mr. Hoag falsely inflated the work force requirements and on the other record evidence supporting the conclusion that the purpose of this manipulation was to allow U.S. Marine to avoid a bargaining obligation as Chrysler's successor, the Board's inference – that the thirty-four former Chrysler applicants were not hired in order to keep at less than fifty per cent the number of former Chrysler workers – was both reasonable and supported by substantial evidence. Our task is

to determine whether the *Board's* interpretation is supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Weather Shield Mfg., Inc. v. NLRB*, 890 F.2d 52, 57 (7th Cir. 1989). We reiterate that we shall not displace the Board's reasonable inferences simply because the ALJ may have reached a different but justifiable conclusion.[16] *See NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524, 529 (7th Cir. 1990); *see also Weather Shield*, 890 F.2d at 57 (fact that Board and ALJ disagree as to inferences drawn from testimony does not alter standard of review).

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[16] We do not disagree with U.S. Marine's contention that "a strong initial decision [by the ALJ] opposite to the Board's decision requires [the court] to consider the evidentiary and analytical basis of the Board's decision with special care." *International Union, UAW v. NLRB*, 802 F.2d 969, 971 (7th Cir. 1986); *see also Weather Shield Mfg., Inc. v. NLRB*, 890 F.2d 52, 57 (7th Cir. 1989). However, the primary difference between the ALJ and the Board's resolution of the unlawful hiring charge does not rest on credibility determinations, and we find no flaw in the Board's analysis of the issue. The Board did not disturb the ALJ's factual determinations, *see* D&O at 1 n.1, but rather drew different legal conclusions from the established facts. Because both the facts and the Board's conclusions are supported by substantial evidence, we will not displace them.

D. The Board's Remedial Order to Restore Terms and Conditions of Earlier Contract[17]

As we have already noted, but repeat for emphasis, Congress has charged the Board, not the courts, with "the task of devising remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *see also supra* pp. 13-14. With these guiding principles in mind, we consider whether the Board's order is entitled to enforcement.

Based on U.S. Marine's failure to bargain as a successor and its unlawful refusal to hire former Chrysler workers, the Board imposed a "make whole" remedy and ordered the company to reinstate the terms and conditions of employment in effect under Chrysler. In challenging this *status quo ante* remedy, U.S. Marine contends that the Board exceeded its authority and claims that this

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[17] The Board asserts that we lack jurisdiction over this part of the appeal. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that, absent extraordinary circumstances, we may not consider objections that were not presented to the ALJ or Board. The Board argues that our review of this claim is precluded by U.S. Marine's failure to move for reconsideration of the remedial order. We reject the Board's argument. We have noted that section 10(e) serves to (1) ensure that the Board has the opportunity to resolve issues within its jurisdiction, and (2) avoid repetitious appeals to the courts. *NLRB v. Wayne Transp.*, 776 F.2d 745, 748-49 (7th Cir. 1985). "[N]either of these policies would be served by deferral of the issue to another time." *Id.* at 749. First, the Board was put on notice of this matter by the General Counsel and Union's (1) exceptions to the ALJ's recommended order, and (2) extensive briefs to the Board. The Board not only had the opportunity to but did resolve the issue. Second, we fail to see how consideration of the company's claims will generate repetitive appeals.

portion of the order is improperly punitive. For the following reasons, we cannot accept the company's claim.

Under the mandate of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), a successor employer that does not agree to the substantive terms of a collective bargaining agreement in force between a union and the predecessor generally is not bound to observe those terms. Thus, a successor employer is "ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Id.* at 294. However, "there will be instances in which it is perfectly clear that the new employer plans to retain all[18] of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." *Id.* at 294-95. Where all or substantially all of the predecessor's employees would have been retained but for the successor's unlawful discrimination, the successor loses the right to set initial terms and conditions of employment and violates the Act if it unilaterally alters the predecessor's terms without first consulting the union. In such cases, the Board may impose a *status quo ante* remedy to restore the situation to what it would have been absent the successor's unfair labor practices. *See Systems Management, Inc. v. NLRB*, 901 F.2d 297, 306-07 (3d Cir. 1990), *enforcing in relevant part* 292 N.L.R.B. No. 125, 131 L.R.R.M. (BNA) 1729 (1989); *NLRB v. Shortway Suburban Lines, Inc.*, 862 F.2d 309 (3d Cir. 1988),

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[18] The Board has construed the word "all" to mean "all or substantially all." *Kallmann v. NLRB*, 640 F.2d 1094, 1103 n.18 (9th Cir. 1981); *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664, 671 n.35 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

enforcing without opinion 286 N.L.R.B. 323 (1987); *American Press, Inc. v. NLRB*, 833 F.2d 621, 624-25 (6th Cir. 1987), *enforcing in relevant part* 280 N.L.R.B. 937 (1986); *Kallmann v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981), *aff'g in part Love's Barbeque*, 245 N.L.R.B. 78 (1979);[19] *NLRB v. Potter's Drug Enters., Inc.*, 584 F.2d 980 (9th Cir. 1978), *enforcing without opinion* 233 N.L.R.B. 15 (1977); *Asseo v. El Mundo Corp.*, 706 F. Supp. 116, 128 (D.P.R. 1989).[20] We now examine whether these principles permit the application of such a remedy in the case before us.

The goal of a remedial order is "to create 'a restoration of the situation, as nearly as possible, to that which would have obtained' but for the unfair labor practices." *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 307 (7th Cir. 1981) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). Here, in the Board's view, the *status quo ante*

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[19] The Ninth Circuit in *Kallmann* concluded that a successor was obligated to consult with the union before setting the terms and conditions of employment and that failure to do so constituted a violation of the Act. 640 F.2d at 1102-03. Based on the facts of the case, however, the court declined to enforce a *status quo ante* remedy, although that court previously had enforced such a remedy in *NLRB v. Potter's Drug Enterprises, Inc.*, 584 F.2d 980 (9th Cir. 1978), *enforcing without opinion* 233 N.L.R.B. 15 (1977).

[20] *See also Elastic Stop Nut Div. of Harvard Indus.*, 294 N.L.R.B. No. 88, 131 L.R.R.M. (BNA) 1759, 1760 (1989), *enforced*, 921 F.2d 1275 (D.C. Cir. 1990); *D & K Frozen Foods, Inc.*, 293 N.L.R.B. No. 104, 132 L.R.R.M. (BNA) 1053, 1053-54 (1989); *Fremont Ford Sales Inc.*, 289 N.L.R.B. No. 137, 131 L.R.R.M. (BNA) 1074, 1080-81 (1988); *State Distrib. Co.*, 282 N.L.R.B. 1048, 1048-50 (1987).

remedy is justified by the nature and scope of the violation: from the start, U.S. Marine made clear that it had no intention of recognizing the Union. In furtherance of that goal, the company falsely manipulated manpower projections and unlawfully refused to hire thirty-four of its predecessor's employees in order to avoid triggering its duty to bargain as a successor employer. But for its unlawful conduct, U.S. Marine would have hired substantially all of Chrysler's employees and therefore would have been obligated to consult with the Union before setting the terms and conditions of employment. *See, e.g., Burns*, 406 U.S. at 294-95; *American Press*, 833 F.2d at 624-25; *Kallmann*, 640 F.2d at 1102. Thus, the Board maintains that U.S. Marine must reinstate the terms and conditions of employment in effect under Chrysler in order to restore the situation to what it would have been absent U.S. Marine's unlawful conduct.[21] *See Keystone Steel & Wire*, 653 F.2d at 307.

In challenging the Board's imposition of the *status quo ante* remedy, U.S. Marine focuses on the Supreme Court's statement in *Burns* that such consultation is

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[21] This is not to say that U.S. Marine also must retain all unilateral changes that are beneficial to the employees. In its order, the Board required U.S. Marine to rescind all detrimental unilateral changes and reinstitute the terms and conditions of employment that were in effect when Chrysler closed its doors. The Board noted that nothing in its order was "to be construed as requiring rescission of any wage increase or other benefits that previously have been granted the unit employees." D&O at 9 n.6. Thus, the Board did not require U.S. Marine both to restore the *status quo ante* and leave in place all beneficial changes, such as the wage increase implemented on January 21, 1985, but left that decision up to the company.

appropriate when "it is perfectly clear that the new employer plans to retain all of the employees in the unit." 406 U.S. at 294-95. The company submits that it was never "perfectly clear" that U.S. Marine intended to hire all of Chrysler's former employees. In our view, however, the Board was entitled to infer that, but for its unlawful purpose, U.S. Marine would have hired substantially all of the former Chrysler employees notwithstanding its announcement that it would set its own terms and conditions of employment. *See Kallmann*, 640 F.2d at 1102-03; *Shortway Suburban Lines*, 286 N.L.R.B. at 328; *State Distrib. Co.*, 282 N.L.R.B. 1048, 1048-49 (1987); *American Press*, 280 N.L.R.B. at 938; *Potter's Drug Enters.*, 233 N.L.R.B. at 20. U.S. Marine argues that, because the ALJ heard testimony from only twelve of the thirty-four former Chrysler employees involved in this case, it would be unfair to uphold the Board's determination that all of the former Chrysler employees would have been hired. However, U.S. Marine's unlawful conduct created any uncertainty concerning whether substantially all of the former Chrysler employees would have been hired. Because the company may not be permitted to benefit from its discriminatory activities, such uncertainty must be resolved against U.S. Marine. *Kallmann*, 640 F.2d at 1102-03; *Shortway Suburban Lines*, 286 N.L.R.B. at 328; *State Distrib.*, 282 N.L.R.B. at 1048-49; *American Press*, 280 N.L.R.B. at 938; *Potter's Drug Enters.*, 233 N.L.R.B. at 20.

Next, U.S. Marine relies on the Board's decision in *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), *enforced without opinion*, 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, the Board held that

> [w]hen an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court.

Id. at 195. Consequently, concluded the Board, the successor's duty to consult the union before implementing changes in the terms of employment should apply only when the successor has failed to announce its intent to hire employees under new working conditions or has misled the predecessor's employees into believing that they would be retained under the same conditions. *Id.*

We believe that the company's reliance on *Spruce Up* and its progeny is misplaced. In *Spruce Up*, there was *a legitimate* ambiguity as to whether the new employer would in fact be able to hire the predecessor's employees because the new terms were substantially different from those of the predecessor. The employer did not refuse unlawfully to hire its predecessor's employees in order to avoid having to recognize and bargain with the union. By contrast, U.S. Marine, *by its illegal activity*, has created any ambiguity as to whether all or nearly all Chrysler employees would have accepted positions. That ambiguity must be resolved against it.[22]

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[22] The Board's *Spruce-Up* doctrine has been endorsed and somewhat reformulated by the Second Circuit. *See Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980); *Nazareth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977); *Brotherhood of Railway etc.*

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U.S. Marine correctly argues that the Board may not impose punitive remedies. *See NLRB v. Strong*, 393 U.S.

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v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975). This process began in *REA Express*, where the court indicated its understanding of the *Burns* exception as "being limited to those situations where employees are led at the outset by the successor-employer to believe that they will have continuity of employment on pre-existing terms and as not applying where the new employer dispels any such impression prior to or simultaneously with its offer to employ the predecessor's work force." *Id.* at 171 (citations omitted). Again, in *Nazareth Regional High School*, the Second Circuit refused to find a perfectly clear exception where the successor employer never indicated to the employees that they would be hired on identical terms. As the court stated, "[t]he important consideration in determining whether it is perfectly clear that a successor intends to retain all of the employees is whether they have all been promised re-employment on the existing terms." 549 F.2d at 881. Finally, in *Saks & Co.*, the Second Circuit articulated its understanding of the perfectly clear exception:

> [A] successor employer is required to bargain with respect to initial terms only if it is perfectly clear that it plan [sic] to retain all the employees in the predecessor unit and hires those employees in a manner which leads them to believe that they will be hired on the terms and conditions that existed under the predecessor employer.

634 F.2d at 687.

Under the Second Circuit's formulation of the *Burns* exception, a union must show: (1) that it was perfectly clear that the employer intended to rehire substantially all of the predecessor's employees; *and* (2) that it intended to do so on identical terms. Applied literally, this reformulation of the *Burns*

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357, 359 (1969); *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1291 (7th Cir. 1989). Although the Board's "choice of remedy must . . . be given special respect by the reviewing courts," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969), "the remedy chosen must 'achieve the remedial objectives which the Act sets forth,' " *Yorke v. NLRB*, 709 F.2d 1138, 1144-45 (7th Cir. 1983) (quoting *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940)), *cert. denied*, 465 U.S. 1023 (1984); *Emsing's Supermarket*, 872 F.2d at 1291 (quoting *Yorke*). Because the Board's order remedies a violation of the Act, we cannot accept the company's claim that the Board's order is punitive. In this case, the Board specifically concluded that its order to restore Chrysler's terms of employment was "strictly a remedial matter," designed simply to "restor[e] as nearly

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exception would appear to limit the *Burns* exception to situations where the employer announces that it intends to offer exactly the same terms; there would only be a duty to bargain with the union when nothing will be changed. However, this is an issue that we need not confront definitively in this case. In none of these cases did the Board find that the employer had discriminated against former employees because of their union membership. Here, by contrast, the Board found that substantially all the predecessor's employees would have been retained but for the successor's unlawful discrimination. Under these circumstances, an employer whose unfair labor practices have created ambiguity as to whether substantially all of the predecessor's employees would have been retained will not be permitted to profit from the situation. Instead, the Board will presume that, but for the discriminatory practices, substantially all of the employees would have been retained and the employer would be obliged to consult with the union before setting new terms.

as possible the situation that would have prevailed but for [U.S. Marine's] unfair labor practices." D&O at 10. U.S. Marine's unfair labor practice – discriminating against former employees because of their union membership – created ambiguity as to whether substantially all of the predecessor's employees would have been retained, a crucial precondition for bargaining with the union over initial terms of employment. The Board's order is designed to prevent U.S. Marine from taking advantage of its wrongdoing to the detriment of the employees. The Board presumes that, but for the unlawful practice, substantially all of the employees would have been retained and the employer would be obliged to consult with the union before setting new terms. Because of this obligation to bargain with the Union, restoration of the previously existing employment terms, the *status quo ante*, is an appropriate remedy. It is an imprecise remedy because it must estimate to some degree the situation that would have occurred if there had been no discrimination and the old work force, through its union, had commenced negotiations with the employer. Some terms offered by the new employer may be considered favorable by the employees; some may be considered unfavorable. An employment package has many components. A return to the *status quo ante* at least allows the bargaining process to get under way. As the Board correctly noted,

> "[a] remedy that allowed to stand the reduced terms and conditions of employment that the Respondent imposed unilaterally . . . would quite possibly leave victims uncompensated and it would confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns*

> successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred."

D&O at 11 (quoting *State Distrib. Co.*, 282 N.L.R.B. 1048, 1049 (1987)). The Board's order was an appropriate attempt to give meaning to the "perfectly clear" exception of *Burns* when the employer's conduct has confused the situation.

"Restoration of the *status quo ante* following an unfair labor practice is *prima facie* appropriate; it is for the [employer] to demonstrate that it is not appropriate." *North Carolina Coastal Motor Lines, Inc.*, 219 N.L.R.B. 1009, 1010 (1975), *enforced*, 542 F.2d 637 (4th Cir. 1976).[23] U.S. Marine has failed to do so.

Finally, U.S. Marine claims that imposition of the *status quo ante* remedy offends due process because the unfair labor practice charge did not allege that the company had violated the Act by setting the initial terms of employment in January 1984 without first consulting with the Union. First, the charge specifically alleged that the

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[23] *See also NLRB v. Strong*, 393 U.S. 357, 359 (1969) (Act does not authorize punitive measures, but make-whole remedy that compensates employees " 'for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces' ") (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941)); *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 306-08 (7th Cir. 1981) (*status quo ante* remedy imposed after employer unilaterally altered term of employment was not punitive; fact that "some employees ultimately may receive greater benefits than they would have received if the Company had not acted illegally" is not due to defect in Board's order, but to employer's unlawful conduct, *id.* at 308).

company had violated section 8(a)(3) and (5) of the Act by refusing to hire thirty-four former Chrysler employees in order to avoid a bargaining obligation and by refusing to bargain with the Union. The remedy ordered in this case is based on the established principles applicable to successors who discriminate in order to avoid a bargaining obligation; such employers lose the right to set initial terms and conditions of employment and may be ordered to rescind any changes in those terms and compensate employees for losses in order to put them in the position they would have been but for the employer's unlawful conduct. *E.g., Shortway Suburban Lines*, 286 N.L.R.B. at 329-30; *State Distrib.*, 282 N.L.R.B. at 1048-50; *American Press*, 280 N.L.R.B. at 943-44. Thus, as the Board concluded, the illegal nature of the unilateral changes was subsumed in the broader section 8(a)(3) and (5) allegations and violations involved in the case. Consequently, U.S. Marine was "on notice that the Board might apply an appropriate remedy in its power should the Board find the violations alleged." D&O at 11.

Moreover, strictly remedial matters need not be specifically alleged in the unfair labor practice complaint. *North Carolina Coastal Motor Lines*, 219 N.L.R.B. at 1009.[24]

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[24] *See also Sinclair Glass Co.*, 188 N.L.R.B. No. 33, 76 L.R.R.M. (BNA) 1289 (1971), *enforced*, 465 F.2d 209 (7th Cir. 1972), where the Board imposed a *status quo ante* remedy and stated that it did

> not believe that our make-whole remedy should be withheld on the ground that the Charging Party and

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As this court recently noted in *NLRB v. Schwab Foods, Inc.*, "[i]t is well-settled that, while General Counsel's complaint must give a respondent fair notice of the violations charged, '[i]t is unnecessary for the complaint to spell out the details of the relief to be requested if it is found that the Act has been violated.' " 858 F.2d 1285, 1294 (7th Cir. 1988) (quoting *NLRB v. Winchester Elecs., Inc.*, 295 F.2d 288, 292 (2d Cir. 1961)).[25] Moreover, U.S. Marine has failed to show that it was prejudiced in any way by the General Counsel's failure to allege specifically that the company was not entitled to set the initial terms and conditions of employment. Had the company formally and specifically been informed of the possibility of the imposition of this remedy, its rejoinder would have been

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> the General Counsel have not requested such a remedy or the circumstance that the Respondent has not violated Section 8(a)(5) as well as Section 8(a)(3) in this instance. It is a principle too well established in Board law to require citation of authority that a question of remedy is within the discretion of the Board. Section 10(c) [29 U.S.C. § 160(c)] *directs* the Board . . . "to take such affirmative action . . . as will effectuate the policies of this Act."

Id. at 1291 (emphasis in original). Similarly, we do not believe that the *status quo ante* remedy, which was imposed to make whole U.S. Marine's employees, should be deleted from the Board's order.

[25] In *Winchester Electronics*, 295 F.2d at 292, the Second Circuit noted that "if the complaint alleges unfair labor practices that could result in the Board's use of such a remedy, the respondents have been sufficiently informed."

duplicative or cumulative of its other submissions. The company would have argued that it was not under a duty to consult with the Union before setting the terms and conditions of employment because former Chrysler workers would not constitute a majority of the company's full work force.[26]

In sum, we conclude that, had U.S. Marine not engaged in unlawful conduct, it would have been obligated to consult with the Union before setting the initial terms and conditions of employment and would have been under a duty to recognize and bargain with the Union in good faith. Instead, the company imposed its own terms and bargained in bad faith. Ordering U.S. Marine to reinstitute the terms of employment in effect under Chrysler restores, " 'as nearly as possible,' " the environment in which U.S. Marine should have bargained. *Keystone Steel & Wire*, 653 F.2d at 307 (quoting *Phelps*, 313 U.S. at 194). The Board's order remedies the company's unlawful refusal to bargain as a successor and unlawful refusal to hire thirty-four former Chrysler employees and therefore effectuates the policies of the Act. The order is not punitive and does not violate U.S.

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[26] The company asserts that it would have offered additional evidence that applicants were informed in advance that they would be working under different terms. However, U.S. Marine established that point, and further evidence would have been merely cumulative.

Marine's due process rights. As such, it is entitled to enforcement.[27]

E. The Union's Appeal

The Union challenges the Board's remedial order in three respects. First, the Union contends that the Board's refusal to include a visitorial clause constitutes an abuse of the Board's discretion. Second, the Union claims that the Board exceeded the bounds of its discretion in failing to direct U.S. Marine to reimburse the Union for its litigation expenses. Finally, the Union asserts that the Board's failure to refer this case to the Justice Department constitutes legal error.

1. Visitorial clause

The Union claims that the Board abused its discretion by failing to include the visitorial clause recommended by the ALJ. More specifically, the Union challenges the Board's mere citation to *Cherokee Marine Terminal*, 287 N.L.R.B. No. 53, 128 L.R.R.M. (BNA) 1051 (1988), and summary rejection of the ALJ's recommendation. In *Cherokee Marine*, the Board declined the General Counsel's invitation to include regularly a "model" visitorial clause in its remedial orders. *Id.* at 1052. The Board found that

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[27] See *Keystone Steel & Wire*, 653 F.2d at 307 (order including *status quo ante* remedy was enforced where employer unilaterally altered health benefits without consulting union; remedy of "correcting a unilateral change in a term or condition of employment" was "consistent with an important policy behind the Act").

inclusion of the clause "would not further the Board's remedial goals more effectively than enforcement mechanisms already available." *Id.* Moreover, the Board was "especially troubled by practical concerns . . . and by the potential for abuse inherent in [the visitorial clause's] lack of limits, specificity, and procedural safeguards." *Id.* at 1053. Of particular concern was the fact that, as in this case, the recommended clause set no time limits on the Board's access to the company's records and statements. *Id.*; *see supra* note 7. Based on these and other concerns, the Board concluded that

> broad visitatorial rights . . . will remain an extraordinary remedy to be used only when warranted by the facts of a particular case. . . .

Therefore, we will continue to grant visitatorial rights, on a case-by-case basis, when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance.

128 L.R.R.M. at 1052, 1054.[28]

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[28] The Union relies upon *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989), for the proposition that "the Board's cursory reference to its *Cherokee Marine Terminal* decision [was rejected] as being an adequate justification to deny a visitorial clause." Union's Br. at 14. The Union's reliance on this case is misplaced. In *Teamsters Local 171*, the Board adopted the ALJ's conclusion that the employer's violation of the Act evidenced a complete disregard for the rights of its employees, but rejected the ALJ's recommended inclusion of a visitorial clause. 863 F.2d at 958. Significantly, the Board's order *predated* the *Cherokee Marine* decision. See *id.* at 947. The District of Columbia Circuit did

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In this case, the Board adopted the ALJ's factual conclusions regarding the employer's conduct, but specifically found, in light of *Cherokee Marine*, that a visitorial clause was not warranted. The court in *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989), upon which the Union relies, expressly declined to comment on the necessity of a visitorial clause, noting that the matter was for the Board to assess in the first instance. *Id.* at 958. The Board has made such an assessment here. Given our standard of reviewing the Board's remedial determinations, *see supra* pp. 12-14, we decline to disturb the Board's conclusion

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not hold, as the Union argues, that the Board may not support its conclusions by mere citation to an earlier case. Indeed, such a position would have been in error. As the Supreme Court has acknowledged, "the Board may articulate the basis of its order by reference to other decisions . . . so long as the basis of the Board's action . . . meets the criteria for judicial review." *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443 n.6 (1965) (case remanded where Board's action could not properly be reviewed because Board failed to articulate reasons for its decision). We do not find a similar problem here. The Board's reliance on *Cherokee Marine*, where the Board reviewed the problems associated with visitorial clauses and determined that they are to be included in remedial orders only when warranted by the facts of a given case, makes it sufficiently clear that, for purposes of judicial review, the Board disclosed the basis of its order and indicated that it had exercised its discretion. *See Metropolitan Life*, 380 U.S. at 443. Rather, the court in *Teamsters Local 171* determined that a remand was necessary to allow the Board to reconsider its rejection of the recommended visitorial clause in light of the intervening *Cherokee Marine* decision. 863 F.2d at 958.

that a visitorial clause was unnecessary to remedy U.S. Marine's violations of the Act.[29]

2. Litigation Expenses

Before the Board, the Union took exception to the ALJ's failure to award legal costs, attorney fees, and the costs incurred by the Union in attending bargaining sessions. The Board subsequently ordered U.S. Marine to reimburse employee members of the Union's negotiating committee for wages lost while attending negotiating sessions, but did not address the Union's request for litigation costs. The Union argues that the Board's failure to address this issue and to order U.S. Marine to reimburse the Union for such costs constitutes an abuse of the Board's discretion. Accordingly, the Union requests that the case be remanded to the Board.[30]

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[29] Moreover, the order we enforce today allows the Board access to U.S. Marine's records relevant to compliance with the back pay and reinstatement provisions. Although the evidence certainly supports the Board's determination that U.S. Marine engaged in multiple unfair labor practices, there is not such overwhelming evidence of a likelihood that the company will "fail to cooperate or otherwise attempt to evade compliance," *Cherokee Marine Terminal*, 287 N.L.R.B. No. 53, 128 L.R.R.M. (BNA) 1051, 1054 (1988), that we can say it was an abuse of the Board's discretion not to include a visitorial clause.

[30] As a threshold matter, we reject the Union's contention that, because the Board did not articulate its reasons for denying the Union's requested relief, this case *must* be remanded. The Union relies on *K & I Transfer & Storage, Inc. v. NLRB*, 805 F.2d 749 (7th Cir. 1986), in urging that a remand is required.

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The Board first ordered an employer to reimburse litigation costs and expenses in *Tiidee Products, Inc.*, because the employer had engaged in "patently frivolous" litigation. 194 N.L.R.B. 1234, 1235 n.10, 1236-37 (1972), *enforced in relevant part sub nom. International Union of Elec. Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). "Under *Tiidee Products*, the Board may order certain extraordinary remedies, such as the payment of attorney's fees, if it determines that a party has engaged in frivolous litigation." *Farrens Tree Surgeons, Inc.*, 264 N.L.R.B. No. 90, 111 L.R.R.M. (BNA)

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However, this case is factually distinguishable from *K & I Transfer*, where the prevailing party filed an application for attorney fees pursuant to the Equal Access to Justice Act. Here, the Union provided the ALJ with a recommended order and excepted to the ALJ's refusal to grant all of the relief requested. In *K & I Transfer*, the Board had failed in its order to make any reference to the company's request for costs, and the court was unable to find that the order had "implicitly rejected" that request. *Id.* at 753. By contrast, in this case, we conclude that the Board implicitly rejected the Union's exception with regard to litigation costs. In its exceptions, the Union challenged "[t]he ALJ's remedy and order insofar as they fail . . . to require [U.S. Marine] to pay to the Union those costs and expenses the Union incurred in attending fruitless bargaining meetings with [U.S. Marine's] representatives and its legal costs and reasonable attorney fees." Union's Exceptions to the ALJD (Sept. 25, 1986) at 3. The Board specifically addressed the first portion of this exception and ordered U.S. Marine to reimburse employee members of the Union's negotiating committee for the time spent in bargaining sessions. While we disapprove of the Board's failure to put its denial in writing, we are able to conclude that, based on this tacit rejection of the Union's request, the record before us, and the applicable law, denying the requested relief was well within the Board's discretion.

1305, 1305 (1982); see also *Autoprod, Inc.*, 265 N.L.R.B. No. 42, 111 L.R.R.M. (BNA) 1521, 1522 (1982) (reimbursement of expenses ordered where employer's arguments were "patently frivolous" and employer had long history of intransigence).[31]

The Board refrains from assessing litigation costs " 'where the defenses raised by [the employer] are "debatable" rather than "frivolous." ' " *Workroom for Designers, Inc.*, 274 N.L.R.B. No. 115, 119 L.R.R.M. (BNA) 1067, 1071 (1985) (quoting *Heck's, Inc.*, 215 N.L.R.B. 765, 767 (1974)).[32] Of particular importance in determining

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[31] *But see NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974), where the union sought reimbursement of litigation expenses and excess organizational costs incurred as a result of the employer's unlawful conduct. The Board had refused to award such expenses, but the court of appeals enlarged the Board's order and awarded the costs, relying on the Board's intervening decision in *Tiidee Products*. The Supreme Court determined that the court of appeals did not have the statutory authority to so enlarge the Board's order and therefore remanded the case to allow the Board to consider whether *Tiidee Products* would be applied retroactively. *Id.* at 8-10. However, the Court expressly reserved the question of whether the Board's authority to fashion remedies includes the power to award litigation expenses. *Id.* at 8 n.9.

[32] This is true even when the employer has committed "flagrant" unfair labor practices and engaged in " 'clearly aggravated and pervasive misconduct.' " *Workroom for Designers*, 119 L.R.R.M. at 1071 (quoting *Heck's*, 215 N.L.R.B. at 767). Thus, the Board refused to award litigation costs in *Workroom for Designers*, although the employers committed "numerous and egregious" unfair labor practices, discriminated against most of their employees, and even stipulated to their antiunion animus. *Id.* at 1070.

whether a defense is "debatable" or "frivolous" is the degree to which the outcome of the case depends upon credibility determinations. For example, in *Farrens Tree Surgeons*, an employer sought litigation costs after the unfair labor practice complaint against it was dismissed. 111 L.R.k.M. at 1305. The Board could not conclude that the litigation was frivolous and therefore refused to award such costs. Of significance was the fact that the dismissal "was based, *in part*, on [the ALJ's] credibility resolution" of a witness' testimony. *Id.* (emphasis supplied). Similarly, in *Workroom for Designers*, where an award of legal fees and expenses was found inappropriate due to the employer's debatable defenses, the Board emphasized the fact that "[t]he merits of several of the complaint's allegations turned on credibility resolutions." 119 L.R.R.M. at 1071.

The Supreme Court has stated that an appellate court may not enlarge the Board's order, but must remand the case when the court "concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances." *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 (1974). In this case, we conclude that the factual circumstances do not justify a remand. Neither the ALJ nor the Board found this litigation frivolous. Moreover, the outcome of the unfair labor practice charges against U.S. Marine turns almost solely on the ALJ's credibility determination, which the Board adopted, of Mr. Hoag's testimony. As the Union itself notes, most of U.S. Marine's unlawful conduct stems from its reliance on the falsely inflated work force estimates. *See* Union's Br. at 17. Because, unlike the

situation in *K & I Transfer & Storage, Inc. v. NLRB*, 805 F.2d 749, 753 (7th Cir. 1986), we can conclude that the Board implicitly – and justifiably – rejected the request for litigation costs, a remand on this issue is not appropriate.

3. Referral to the Justice Department

The Union's final claim is without merit. The Union asserts that the Board erred in not referring this case to the Justice Department pursuant to 18 U.S.C. § 1001, which prohibits the giving of knowingly false or fraudulent statements in a matter within the jurisdiction of a governmental agency.[33] The basis of the Union's claim is the Board's conclusion that James Hoag falsely inflated the anticipated employment figures to deceive the Board and the courts. The ALJ considered the Union's request, but determined that the interests of justice would not be served by drawing Mr. Hoag's conduct to the attention of

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[33] Section 1001 provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

the Justice Department. The Board did not specifically address this issue in its Decision and Order.

We have found no case *requiring* the Board to refer cases to the Justice Department. Certainly, the Board need not include such a referral in its order disposing of an unfair labor practice.

Conclusion

For the foregoing reasons, we deny U.S. Marine's and the Union's petitions for review and grant enforcement of the Board's order.

PETITIONS FOR REVIEW DENIED; CROSS-PETITION FOR ENFORCEMENT GRANTED

EASTERBROOK, *Circuit Judge*, with whom POSNER, COFFEY, MANION, and KANNE, *Circuit Judges*, join, concurring in part and dissenting in part. Substantial evidence supports the Board's conclusion that U.S. Marine did what it thought expedient to evade its obligation to bargain collectively with its workers. A remedy is in order.

Again, with emphasis: a *remedy* is in order. Unlike other agencies that may impose fines and penalties to deter misconduct, the Labor Board is confined to make-whole relief. It may put the workers in the position they would have occupied had there been no violation, and it may restrain future violations. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-01 (1984); *NLRB v. Strong*, 393 U.S. 357, 359 (1969); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194-98 (1941); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197,

235-36 (1938). See also § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). Any excess is a penalty.

Perhaps the agency should have the power to penalize, but it does not. What the Board characterizes as a "forfeiture" of the successor employer's privilege to set its own terms and conditions of employment is a penalty by another name – and not a much different name at that. I therefore disagree with Part II.D of the court's opinion, which requires U.S. Marine to apply to its entire workforce in 1991 the terms and conditions that Chrysler was using when it closed in 1983, and to provide back pay based on these 1983 terms. I join the remainder of the opinion.

Step one in resolving the question whether the Board's order is a remedy is determining what would have happened if U.S. Marine had respected its obligations under the law. Perhaps U.S. Marine was obliged to afford its workers the benefit of the Chrysler contract, on the theory that when a successor is likely to hire most of the predecessor's workers, it must use the predecessor's terms until the union consents to the change or the parties reach impasse after lengthy good-faith bargaining. *Cf. Litton Financial Printing v. NLRB*, 111 S. Ct. 2215, 2221-23 (1991). Although our panel so held, today no member of this court endorses that belief. The language and rationale of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), like the Court's other successorship cases, create only a bargaining obligation even if the successor plans to (and does) hire all of its predecessor's employees.

A bona fide sale of the business enables the successor to start with its own terms. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987); *Burns*, 406 U.S. at 284-91. Change may be the only alternative to consigning the plant to the scrap heap. *Burns*, 406 U.S. at 287-88. Denying the successor the right to establish its own wages and other terms whenever it is likely to hire substantially all of the predecessor's workers could prevent this process from occurring and lead to liquidation rather than revivification. Paradoxically it also would discourage successors from making generous offers to labor. If the buyer offers an attractive package of wages and other terms and conditions of employment, many of the old employees will want to cross over; the NLRA forbids discrimination against them; once they cross over the employer would be forced to restore the old package in toto – even if it makes the transaction uneconomic. If the buyer offers a package that is unattractive to the old work force, it avoids any risk of being forced to up the ante, but it also may have trouble hiring workers with the skills needed to run the business.

The Board implies that when the new employer wants to change the work rules but is willing to offer high wages, it can't do so (because too many of the old employees will apply), while if the work rules are OK and the new employer wants to drop the wages, it may do this because it will believe that it has made the job unattractive to the old workers. Neither labor law nor the economics of restoring failing businesses to health supports or allows such a distinction – especially not when the only way to know whether the predecessor's workers

are likely to transfer their loyalties is to see whether they do.

The Second, Fourth, Ninth, and District of Columbia Circuits have held that successors may set their own terms and conditions whether or not the firm expects its predecessor's employees to cross over *en masse*. *Saks & Co. v. NLRB*, 634 F.2d 681, 687-88 (2d Cir. 1980); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 881-82 (2d Cir. 1977); *NLRB v. Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975), enforcing 209 N.L.R.B. 194 (1974); *Kallmann v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981); *NLRB v. Dent*, 534 F.2d 844, 847 (9th Cir. 1976); *International Association of Machinists v. NLRB*, 595 F.2d 664, 672-76 (D.C. Cir. 1978). These courts conclude that the remark in *Burns*, 406 U.S. at 294-95, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms" does not prevent the successor from setting initial terms. The Court said that a successor may be required to consult with the union; an obligation to "consult" does not imply an obligation to use the old terms unless the union agrees to different ones. The workers have a self-help response if the successor's package is unacceptable: they may decide, individually or collectively (recall that they are already organized), not to work unless the successor sweetens the pot.

Elsewhere in *Burns* the Court wrote: "It does not follow . . . from [the successor's] duty to bargain that it was bound to observe the substantive terms of the collective-bargaining agreement the union had negotiated with

[the predecessor] and to which [the successor] in no way agreed." 406 U.S. at 281-82. Part III of *Burns*, *id.* at 281-91, rejects the Board's position that the successor is substantively bound – a position that the Board wants to revive under the guise of "remedy". Part IV of the opinion, *id.* at 292-96, in which the "perfectly clear" sentence appears, is about bargaining rather than substance. To emphasize this, the Court noted: "It is difficult to understand how [the successor] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to [taking over], no outstanding terms and conditions of employment from which a change could be inferred." *Id.* at 294 (emphasis in original). The Board ignores that observation – plus Part III of *Burns*, and all of *Fall River* – in favor of a tunnel-vision reading of the "perfectly clear" sentence.

A conclusion that the pertinent obligation is to consult with the union sets up the critical question: how can it be remedial to require the successor to use the old terms? My colleagues observe that U.S. Marine's "unlawful conduct created . . . uncertainty concerning whether substantially all of the former Chrysler employees would have been hired." Slip op. at 28. I agree with the court that the Board could resolve against U.S. Marine all factual ambiguities created by its illegal conduct. Let us take it as established that, but for its unfair labor practices, U.S. Marine would have hired substantially all of Chrysler's workers. How does this support the Board's order? U.S. Marine would have been free to use its own terms even if it had shouted from the rooftops that it planned to

hire every Chrysler employee who applied. Uncertainty about the number of workers to be hired cannot matter when even perfect knowledge would not support the Board's directive.

If, as four other courts of appeals hold, U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to hire, then these terms establish the benchmark that the Board is entitled to restore. Had U.S. Marine followed the NLRA to a T, all would have labored on U.S. Marine's terms, not Chrysler's. Subsequent unfair labor practices were designed only to avert the need to bargain with the union. How could it be said that unfair labor practices designed to stymie bargaining require the successor to use particular terms? The Board's rationale is:

> The *Love's Barbeque* remedy that we order here does not require a specific complaint allegation that the Respondents made unlawful unilateral changes when they began their operations. Nor must this remedy rest on a separate finding that the Respondents committed a separate unfair labor practice by unilaterally changing employment terms. The illegality of such changes is subsumed in the broader 8(a)(5) and (3) allegations and violations involved in this case. As noted above, an employer – like the Respondents – that unlawfully discriminates in its hiring in order to evade its obligations as a successor does not have the *Burns* right to set initial terms of employment without first consulting the Union. The Respondents forfeited any right they may have had as a successor to impose initial terms when they embarked on their deliberate scheme to avoid bargaining with

> the Union by their discriminatory hiring practices.

293 N.L.R.B. No. 81 at 10. Whatever else one might say about this passage, it fails to explain – fails to *attempt* to explain – why the "*Love's Barbeque* remedy" is a remedy rather than a penalty. The telling term "forfeited" gives away the game. (A "*Love's Barbeque* remedy", after *Love's Barbeque Restaurant*, 245 N.L.R.B. 78 (1979), enforcement denied in relevant part under the name *Kallmann v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981), is the Board's argot for an order to use a predecessor's wages, terms, and conditions of employment and extend back pay accordingly.)

What are the "obligations as a successor" that U.S. Marine "evade[d]"? Much of the Board's discussion preceding the passage I have quoted assumes that U.S. Marine had to start off with Chrysler's terms if it expected most of Chrysler's employees to want to work for it, using these terms until the union agreed to others or good faith bargaining ended in impasse. Such an obligation would make the Board's order a remedy (for the union has never agreed to changes), but there is no such obligation.

One genuine obligation is to act without discrimination in evaluating those of the predecessor's employees who offer to work. The Board found that U.S. Marine discriminated against 34 of the 257 applicants. The remedy for this sin is to hire the 34; it is not remedial to augment the offer to the other workers or to give these 34 terms better then they would have had if U.S. Marine had hired them in 1984. Had U.S. Marine hired these 34

(rather, had it evaluated their applications without discrimination), the terms afforded all workers still would have been those U.S. Marine set, not those Chrysler set.

The second "obligation[ ] as a successor" that U.S. Marine evaded is to bargain once it expects a majority of its workers to come from Chrysler's employees. See *Fall River*, 482 U.S. at 46-52. The remedy for this evasion is a bargaining order. If the Board were to find that, had U.S. Marine bargained in good faith as the Act requires, it would have agreed to the terms of the Chrysler contract, then it might be possible to say that the Board's order imposing those terms on U.S. Marine is a remedy. The Board made no such finding – understandably. The opportunity to change the antiquated work rules at this outboard motor plant was one of the things creating a prospect for turning this losing venture around. In May 1984, less than five months after U.S. Marine took over, the district court issued a § 10(j) injunction requiring U.S. Marine to bargain with the union. *Squillacote v. U.S. Marine Corp.*, 116 L.R.R.M. 2663 (E.D. Wis. 1984); see also *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718-21 (7th Cir. 1987). Seven years of bargaining have not led to restoration of Chrysler's terms. It is unimaginable that U.S. Marine would have agreed to use those terms had the bargaining begun in January 1984 (when it should have) rather than May 1984 (when it did). The Board's rationale is unrelated to the anticipated (or actual) outcome of bargaining; instead the Board found that by deeds after reopening the plant U.S. Marine retroactively "forfeited" the entitlement to set its own terms. That is the language of penalty; its order is the fact of penalty.

Counsel for the Board offered another rationale: if U.S. Marine had known all along that it would be required to bargain with the union, it might not have taken over the plant. Had U.S. Marine kept out of the picture, the workers would have retained the benefits of their collective bargaining agreement with Chrysler. Counsel suggested alternatively that U.S. Marine might have adopted Chrysler's terms to hold down friction with the union. Now the Board said no such things, so counsel's rationalization presents a *Chenery* problem. Let that pass. No such findings could be sustained. If U.S. Marine (or some equivalent buyer) had not appeared, Chrysler would have closed the plant; the workers would have received unemployment compensation, not the wages and terms of the Chrysler contract. U.S. Marine was willing to come in only if it could make the changes it believed were essential to turn this plant around.

Our court endorses none of the Board's approaches (which makes my colleagues' refrain about deference to the Board puzzling, see *Sure-Tan*, 467 U.S. at 899-900 & n.9). Instead the majority rings changes on the theme that it is hard to know how many of Chrysler's workers would have been hired had U.S. Marine behaved itself. This approach is our court's invention. As the successor need not use the predecessor's terms just because it expects to hire substantially all of the predecessor's workers, the uncertainty has no legal significance. Yet the majority is unwilling to hold that labor law creates such a substantive obligation. The Board's rationales are defective; the majority's substitute is mysterious.

Labor law commands us to patrol the border between remedy and penalty. Perhaps that indistinct line is not

worth drawing. Lack of authority to penalize, and thus to deter, means that there will be too many violations. Agencies, sensing the need to pack a wallop, strain against the limits of their powers and create *de facto* penalties. Needing to make a penalty look like a remedy, the Board prescribes back pay and restoration of terms – in other circumstances remedial, but here exceeding the sanction that would be appropriate if the Board had the power to impose explicit fines. Chrysler's workers received generous severance packages on the premise that U.S. Marine was not a mere continuation of the old business. *Allied Industrial Workers Local 879 v. Chrysler Marine Corp.*, 819 F.2d 786 (7th Cir. 1987). They have received wages from U.S. Marine to compensate them for the elimination of the antique manning tables and work rules. Now they receive a third salve, in back pay, for the loss of the work rules they enjoyed when Chrysler ran the plant, and U.S. Marine must use those rules from now on. None of this is remedial, and as a penalty it is not only too high but also interferes with the future operation of the plant. How much cleaner if the Board could levy a hefty fine, distribute the money to the workers, and be done. Instead the Board's pretense of "remedy" has produced an order that may make profitable production impossible. By approving this masquerade we preserve featherbedding, increase the risks of taking over foundering firms, and frustrate the revival of aging plants. Neither American workers nor American consumers will welcome this consequence.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

U.S. MARINE CORPORATION
AND BAYLINER MARINE
CORPORATION

and

INTERNATIONAL UNION,
ALLIED INDUSTRIAL
WORKERS OF AMERICA,
AFL-CIO, AND ITS
AFFILIATED LOCAL,
LOCAL UNION 879,
ALLIED INDUSTRIAL
WORKERS OF AMERICA

Cases 30-CA-8206
30-CA-8404
30-CA-8537

DECISION AND ORDER

On August 22, 1986, Administrative Law Judge George F. McInerny issued the attached decision. Respondent U.S. Marine Corporation filed exceptions and a supporting brief, the General Counsel filed exceptions with a supporting brief and an answering brief, and the Charging Party filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We affirm the judge's findings that the Respondents constitute a single employer and that, as the successor to the Chrysler Corporation in its Hartford, Wisconsin outboard motor plant, they violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union; by refusing to provide information to the Union; by bargaining in bad faith with the Union; by unilaterally implementing changes in terms and conditions of employment; by bargaining individually with employees; and by establishing and bargaining with the "Safety and Progress Committee," an employer-dominated labor organization. For the reasons set forth below, however, we reverse the judge and find that the Respondents' failure to rehire 34 former Chrysler employees violated Section 8(a)(3) and (1) of the Act. We also have decided to modify the judge's recommended remedy in certain respects as explained below.

As set forth more fully in the judge's decision, the Respondents purchased the facility at issue from Chrysler in late 1983 and began operations on January 23, 1984. James Hoag, who was an officer of both Respondents, was put in charge of running the new operation. In a December 8, 1983 letter, Hoag told Chrysler's employees

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[1] Respondent U.S. Marine Corporation has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

that Respondent Bayliner Corporation had purchased Chrysler's operation, that Bayliner was organizing an affiliated company called U.S. Marine, and that all Chrysler employees were encouraged to apply for work with U.S. Marine. At a December 13, 1983 meeting, Hoag advised three officials of the Union that Bayliner did not intend to recognize the Union, and that Bayliner would not abide by the existing collective-bargaining agreement between Chrysler and the Union. Hoag also stated at this meeting that he was not interested in having a union represent the employees, and that he was too busy to deal with the Union at that time. In addition, in late December 1983, Bayliner Chairman Edson told Chrysler Counsel Richie that the Respondents did not have any intention of recognizing the Union or negotiating with it and that the Respondents intended to hire less than 50 percent of its work force from among former Chrysler employees.

When Chrysler ceased operations at the facility on January 13, 1984, it employed 262 production and maintenance employees represented by the Union. All of these employees were terminated at that time, and were notified that if they wished to be considered for employment by U.S. Marine, they should file applications with the Wisconsin Job Service. Hoag asked the Job Service to send all former Chrysler employees who filed applications to U.S. Marine for interviews without the preliminary screening required of other applicants. Hoag interviewed and screened applicants, and made all the hiring decisions. When the plant reopened on January 23, 1984, Hoag had hired 219 employees, all of whom were former Chrysler employees. As of January 30, the last day on which any former Chrysler employees were hired,

U.S. Marine employed 223 former Chrysler employees out of a total employee complement of 261. In the period from January 23 to August 31, 1984, U.S. Marine's work force ranged from 219 to 323 production and maintenance employees, stabilizing between April and August at 312 to 323 employees. During the January through August period, the number of former Chrysler employees varied from 223 to 218. Of 258 former Chrysler employees who applied for employment with U.S. Marine, 34 were not hired.

Throughout the litigation in this case, which includes a Federal district court injunction requiring the Respondents to bargain with the Union obtained by the General Counsel pursuant to Section 10(j) of the Act, the Respondents have contended that they were not required to bargain with the Union in January 1984 because they had not yet hired a "full complement" of employees, and had projected that they would reach that complement in June 1984 and that the former Chrysler employees would not then be in the majority. As the basis for this contention, the Respondents have relied on Hoag's estimate that U.S. Marine's full complement would be 460 employees, which it would reach in June, and that, therefore, the 223 former Chrysler employees would be less than half of the work force.

For reasons fully supported by the record, the judge found that this 460 figure was false and misleading, and had been developed by Hoag shortly after January 31 to furnish a mathematical basis for a defense to the Union's bargaining claim. Instead, the judge determined that the original manpower projection of 396 employees for June, which had been developed by U.S. Marine's accounting

department on January 20, was a valid estimate of the Company's full-complement figure. In fact, as mentioned above, U.S. Marine's work force never numbered more than the 323 figure attained on August 31. Those 323 employees included 218 former Chrysler employees. Having found that Hoag falsely manipulated projected work force figures prepared by U.S. Marine's accounting department in order to justify refusing to bargain with the Union, the judge concluded that the former Chrysler employees constituted a majority of U.S. Marine's work force when the plant reopened on January 23, 1984, through the period covered by the hearing, i.e., to August 1984. Accordingly, the judge concluded that U.S. Marine was a successor to Chrysler within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and that the Respondents violated Section 8(a)(5) and (1) by refusing, since January 25, 1984, to recognize the Union. We affirm those conclusions.

Despite finding that Hoag fabricated the full employee complement estimates in order to avoid bargaining, the judge refused to find that the failure to rehire 34 former Chrysler employees was part of this unlawful scheme. Contrary to the judge, we find that the Respondents unlawfully failed to hire the 34 employees in order to keep the number of former Chrysler employees below 50 percent of the 460 figure that purportedly represented the full complement of employees to be attained in June, and on which the Respondents based their refusal to recognize the Union.

The judge reasoned that once he had found that the manpower projections computed by Hoag were false and designed to deceive the Board and the court on a theory

that full employment at the 460 level would not be attained until June, it would be inherently contradictory for him also to find that Hoag viewed the 460 figure as a "real, valid goal" and that continued hiring of former Chrysler employees would endanger a "real, valid non-union majority." Thus, the judge found that the General Counsel had failed to establish a prima facie case that the failure to rehire the additional former Chrysler employees violated Section 8(a)(3) and (1).

On the contrary, we find that the General Counsel has established a strong prima facie case that the failure to rehire the 34 employees was discriminatorily motivated, and that the Respondents have not proved that the 34 would not have been hired even without the Respondents' desire to avoid bargaining with the Union. The flaw in the judge's reasoning is his premise that Hoag would have to view the 460 figure as a valid one in order to need to restrict the hiring of former Chrysler employees to under half of that figure. This premise ignores the fundamental fact that the Respondents' central concern was to avoid a bargaining obligation by means of reliance on a false full-complement projection. Once Hoag decided that 460 would be the false projection, it became imperative that he hire fewer than 231 former Chrysler employees, or the 460 figure would become meaningless as a defense to the Union's recognitional claim. Thus, the sham inflation of the full-complement projection and the decision to stop rehiring former Chrysler employees once their number had reached 223 are complementary aspects of the same scheme sought to be carried out by U.S. Marine.

A new owner, like the Respondents, is not obligated to hire any of the predecessor's employees, but may not refuse to hire the predecessor's employees solely because they were represented by a union or to avoid having to recognize the union.[2] The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.[3] We find that all of those factors are present here.

The record clearly establishes the Respondents' animus and discriminatory intent, which appeared even before the Respondents assumed the Chrysler operations and continued through the bargaining that followed as a result of the district court's injunction. The statements of the Respondents' officials, Hoag and Edson, mentioned above, that the Respondents intended to hire less than half of the former Chrysler employee complement were

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[2] *Burns*, supra; *Howard Johnson's v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974).

[3] *Houston Distribution Service*, 227 NLRB 960 (1977); *Lemay Caring Centers*, 280 NLRB 60 (1986), enfd. mem. 815 F.2d 711 (8th Cir. 1987).

made in conjunction with these officials' statements that the Respondents would not recognize the Union, and before the Respondents had considered the qualifications of any of the former Chrysler employees. Further, the Respondents' animus is demonstrated by the numerous 8(a)(5) violations that we have found, and U.S. Marine's falsification of the employment projections in order to evade its bargaining obligation.

In addition, the Respondents have advanced no legitimate reasons for the refusal to hire the 34 former Chrysler employees. The record shows that all the employees who were not hired were good employees, had exemplary work records, and were versatile and skilled in various jobs in the plant.[4] Accordingly, the judge found that the skills, abilities, and versatility and other work-related characteristics of the 34 employees were comparable to those 223 former Chrysler employees who were hired by U.S. Marine. Moreover, U.S. Marine has failed to prove its assertion that the employees who were not hired displayed employment histories, health, seniority, or allergenic characteristics that were substantially different from those of the employees who were hired. In this regard, the judge found that "[t]here is no substantive evidence of why one person was hired and one was not hired." Although U.S. Marine hired some 100 additional employees after January 30, 1984, it never contacted any of the other 34 former Chrysler employees who were comparable in qualifications to those former Chrysler employees who were hired before January 30.

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[4] In addition, these employees had been employed by Chrysler for periods ranging from 10 to 31 years.

The judge's conclusion that, because Hoag knew that the 460 figure was false and invalid, he would have no reason to keep the number of former Chrysler employees under 230, simply does not stand up. The end sought to be achieved by the false "full complement" figure would be frustrated if the former Chrysler employees constituted more than half of that figure. Hoag was solely responsible both for creating the false employment-projection figure and for hiring. It is no coincidence that about the same time that Hoag conceived the 460 figure, he stopped hiring former Chrysler employees. Only one Chrysler employee was hired after the Union requested recognition on January 25. The judge's reasoning mistakenly assumes that Hoag would proffer the 460 figure as a defense to recognition, and then not take this figure into account in making his hiring decisions.

In sum, we find that Hoag's fabrication of the 460 employment projection figure made it imperative that U.S. Marine hire no more than 230 Chrysler employees, and that the failure to hire the 34 employees at issue here was a necessary and integral part of the Respondents' attempt to avoid an obligation to recognize and bargain with the Union. Accordingly, we find that the Respondents violated Section 8(a)(3) and (1) by refusing to hire the additional Chrysler employees.[5]

As mentioned above, the judge found that the Respondents unlawfully failed to recognize the Union on January 25, 1984, subsequently bargained in bad faith

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[5] *Hubacher Cadillac*, 267 NLRB 1062 (1983), enfd. 760 F.2d 275 (9th Cir. 1985); *State Distributing Co.*, 282 NLRB No. 151 (Feb. 5, 1987).

with the Union, and unlawfully made a number of unilateral changes in wages, hours, and terms and conditions of employment. To remedy these violations, the judge ordered the Respondents to bargain in good faith with the Union, to cease and desist from making unilateral changes, and to bargain with the Union over all the changes that the Respondents have made since it began operations on January 23, 1984. The judge, however, left to the compliance stage the question of further unilateral changes in wages, hours, and working conditions.

The General Counsel and the Charging Party except to the judge's failure to direct the Respondents to rescind all adverse unilateral changes and to restore the status quo ante with respect to wages, hours, and other terms and conditions of employment. We find merit to this exception, and shall order the Respondents to rescind all detrimental unilateral changes occurring on and after January 23, 1984,[6] and to reinstitute the terms and conditions of employment that were in effect when Chrysler closed its operations at the facility on January 13, 1984.[7] Under *Burns*, supra, a successor employer is ordinarily free to set initial employment terms, without preliminary bargaining with the incumbent union. When, however, "it is perfectly clear that the new employer plans to retain all

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[6] Including all adverse unilateral changes contained in the Respondents' January 21, 1985 implementation of their final bargaining offer. Nothing in our Order is to be construed as requiring rescission of any wage increase or other benefits that previously have been granted the unit employees.

[7] *American Press*, 280 NLRB 937 (1986); *State Distributing Co.*, supra.

of the employees in the unit," the successor must consult the union before altering the terms and conditions of employment.[8] We have found that the Respondents unlawfully discriminated against 34 of the predecessor's former employees by refusing to hire them. Accordingly, we conclude that absent their unlawful purpose, the Respondents would have retained substantially all the predecessor's employees, and therefore the Respondents were not entitled to set initial terms of employment without first consulting with the Union.[9]

Requiring the Respondents to restore the predecessor's terms and conditions of employment does not violate any principles of due process because this is strictly a remedial matter that does not have to be specifically alleged.[10] The *Love's Barbeque* remedy that we

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[8] *Burns*, supra at 294-295.

[9] *Potter's Drug Enterprises*, 233 NLRB 15 (1977), enfd. mem. 99 LRRM 3327 (9th Cir. 1978); *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981). Although the *Kallman* court agreed that an employer who deliberately avoids successorship through discriminatory hiring violates Sec. 8(a)(5) through its unilateral setting of initial terms, the court disagreed with the theory of the Board's monetary remedy. 640 F.2d at 1102-1103. The Board has explained the basis for the *"Love's Barbeque* remedy" in *State Distributing Co.*, supra, slip op. 3-7, and an order containing that remedy was enforced in *Shortway Suburban Lines*, 286 NLRB No. 30, slip op. 21, fn. 36 (Sept. 30, 1987), enfd. per curiam, 129 LRRM 3144 (3d Cir. 1988).

[10] See, e.g., *N.C. Coastal Motor Lines*, 219 NLRB 1009 (1975).

order here does not require a specific complaint allegation that the Respondents made unlawful unilateral changes when they began their operations. Nor must this remedy rest on a separate finding that the Respondents committed a separate unfair labor practice by unilaterally changing employment terms. The illegality of such changes is subsumed in the broader 8(a)(5) and (3) allegations and violations involved in this case. As noted above, an employer – like the Respondents – that unlawfully discriminates in its hiring in order to evade its obligations as a successor does not have the *Burns* right to set initial terms of employment without first consulting with the Union. The Respondents forfeited any right they may have had as a successor to impose initial terms when they embarked on their deliberate scheme to avoid bargaining with the Union by their discriminatory hiring practices.

Here, we are simply restoring as nearly as possible the situation that would have prevailed but for the Respondents' unfair labor practices. We rely "on the well-established principle that, in cases involving discriminatory conduct, the restoration of the status quo ante is a necessary remedy as it is the Board's policy that the wrongdoer, rather than the innocent victim, should bear the hardships of the unlawful action" (citations omitted), *Mashkin Freight Lines*, 272 NLRB 427, 428 (1984). Failing to return to the status quo ante in this case would encourage the kind of subterfuge and falsification in which the Respondents engaged. As the Board stated in a prior case involving a successor that unlawfully refused to hire a number of the predecessor's employees in order to avoid bargaining, "[A] remedy that allowed to stand the

reduced terms and conditions of employment that the Respondent imposed unilaterally . . . would quite possibly leave victims uncompensated and it would confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." *State Distributing*, supra, slip op. at 6. See also *Shortway Suburban Lines*, supra; *American Press*, supra; *American Stevedoring Co.*, 280 NLR3 756 (1986). In view of this precedent and the complaint's 8(a)(3) and (5) allegations, we do not agree with our colleague that the Respondents reasonably could believe that the General Counsel was not challenging their right to set initial terms and conditions of employment. Contrary to our colleague's suggestion, this case did not simply involve "a mere successorship allegation." The Respondents had ample notice of the General Counsel's intertwined 8(a)(3) and (5) allegations, and therefore were on notice that the Board might apply an appropriate remedy in its power should the Board find the violations alleged.[11]

Further, our dissenting colleague has failed to show how the Respondents have been prejudiced by the General Counsel's failure to allege specifically that the Respondents were not entitled to establish initial terms and conditions of employment. There is nothing indicating that the Respondents would have litigated the case differently, or would have presented any different evidence had such a specific allegation been made. On the

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[11] See *NLRB v. Marin Operating, Inc.*, 822 F.2d 890 (9th Cir. 1987), enfg. 279 NLRB 481 (1986).

contrary, it is clear that the Respondents' defense to the complaint allegations would have been the same, based as it was on the Respondents' false production and manpower projections, and their discriminatory staffing scheme.[12]

Contrary to our dissenting colleague's suggestion, what the Respondents may have stated concerning employment terms during their preemployment interviews with some of the predecessor's employees is immaterial in the circumstances here, in which the Respondents were not entitled to set initial terms because of their discriminatory hiring practices. Thus, our dissenting colleague's reliance on *Starco Farmers Market*, 237 NLRB 373 (1978), is inapposite because the issue in *Starco* was *when* the successor employer was entitled to set initial employment terms, while the issue here is whether the Respondents were entitled to set those terms.

In addition, for the reasons set forth in *M.F.A. Milling Co.*, 170 NLRB 1079 (1968), enfd. sub nom. *Laborers Local 676*, 463 F.2d 953 (D.C. Cir. 1972), we will order the Respondents to reimburse the employee-members of the

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[12] In this regard, we view as a distinction without a difference our dissenting colleague's suggestion that this case is distinguishable from prior cases in which a *Love's Barbeque* remedy has been given because here the refusal to hire did not involve the entire unit of the predecessor's employees. That the Respondents discriminated against only a portion of the unit does not absolve the Respondents from the consequences of that discrimination, i.e., the forfeiture of the right to set initial terms, which is enjoyed by those successor employers who *lawfully* choose to hire fewer than all the predecessor's employees.

Union's negotiating committee for any wages lost while attending past negotiating sessions, with interest.[13]

ORDER[14]

The National Labor Relations Board orders that the Respondents, U.S. Marine Corporation and Bayliner Marine Corporation, Hartford, Wisconsin, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with International Union, Allied Industrial Workers of America, AFL-CIO, and its affiliated Local, Local Union 879, Allied Industrial Workers of America, as the exclusive collective-bargaining representative of their employees in the following appropriate unit:

> All full time production and maintenance employees at the Hartford, Wisconsin plant, except executives, office and clerical workers, salesmen, shop superintendents, supervisors, engineers, nurses, first-aid attendants, guards, temporary summer/seasonal employees, any

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[13] See also *K Mart Corp.*, 242 NLRB 855 (1979); *Preterm, Inc.*, 240 NLRB 654 (1979).

[14] The judge's recommended Order includes a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. We find no need for such a remedial provision here. See *Cherokee Marine Terminal*, 287 NLRB No. 53 (Jan. 28, 1988).

employee in training for the foregoing, and all other employees having the right to hire and discharge.

(b) Refusing to give information to the Union that is reasonably related to the Union's function as collective-bargaining representative and in furtherance of the Union's obligation to process grievances for employees.

(c) Unilaterally changing wages, hours, and other conditions of employment without bargaining about these changes with the Union and bargaining with individual employees concerning such changes.

(d) Engaging in collective bargaining, soliciting and discussing employee grievances with, and meeting with the safety and progress committee, and paying employees for serving on that committee.

(e) Refusing to hire unit members of their predecessor, or otherwise discriminating against employees to avoid having to recognize and bargain with the Union.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondents' employees in the above unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(b) Furnish the Union with any and all information requested by it and reasonably related to its function as collective-bargaining representative.

(c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before the Respondents' takeover from Chrysler Corporation of the Hartford, Wisconsin operations, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from January 23, 1984, until they negotiate in good faith with the Union to agreement or to impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*.[15] The Respondents shall remit all payments they owe to the employee benefit funds and reimburse their employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondents' failure to make these payments. Any amounts that the Respondents must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

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[15] 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(d) Reimburse employee-members of the Union's negotiating committee for any wages they lost while attending past negotiating sessions, with interest to be computed in accordance with *New Horizons for the Retarded*, supra.

(e) Offer to unit employees of the predecessor, who would have been employed but for the illegal discrimination against them, including those listed below, immediate and full employment, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place.

Gerald A. Riege	Michael S. Beckwith
Brian F. Kuehl	Frank Schaeffer
Edward Becker	Charles Deis
Eleanor C. Heimermann	Velora Shilts
Russell F. Thompson	Geraldine A. Prusik
Barbara A. Hopfensperger	Ervin C. Margelowsky
Janet A. McFadden	Richard Wingelman
Doris Koepke	Barbara Constantineau
Alvah P. Ostrander	Diane G. Thom
Roy C. Maher	Deloris M. Bunker
Victoria S. Krueger	Mary A. Bilgreen
Jean D. Whitish	Timothy Noble
Merlin V. Nelson	Otto Quandt
L. O. Schroeder	Carol M. Schumacher
Judith A. Wagner	Rochelle M. Schmidt
Duane A. Whitish	Warren K. Moritz
Harvey W. Grulke	James Schwickert

(f) Make the above-named employees whole for any loss of earnings and benefits they may have suffered by reason of the Respondents' unlawful refusal to employ them. Back pay shall be computed as in *F. W. Woolworth*

Co., 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, supra.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(h) Post at their Hartford, Wisconsin plant copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

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[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated, Washington, D.C. April 17, 1989

James M. Stephens, Chairman

Wilford W. Johansen, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

MEMBER CRACRAFT, dissenting in part.

Contrary to my colleagues, I would not require the Respondents to reinstate the terms and conditions of employment that were in effect when the predecessor ceased doing business. My disagreement with my colleagues is based solely on due-process grounds. The amended consolidated complaint did not allege that the Respondents violated the Act in setting their initial terms and conditions of employment and this issue was not fully litigated. I am unwilling to remedy unilateral changes that were not alleged nor litigated as unlawful.

I do not disagree with my colleagues that the *Love's Barbeque*[1] remedy is often an appropriate remedy in cases involving refusals to hire in successorship situations. See, e.g., *State Distributing Co.*, 282 NLRB No. 151 (Feb. 5,

[1] *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enf. denied in relevant part sub nom. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

1987); *Shortway Suburban Lines*, 286 NLRB No. 30 (Sept. 30, 1987); *American Press*, 280 NLRB 937 (1986), enfd. in relevant part 833 F.2d 621 (6th Cir. 1987), relied on by my colleagues. I differ with my colleagues only in that I would not apply that remedy in cases such as this one in which the Respondents were not put on notice that the setting of initial terms and conditions of employment is alleged to be unlawful.[2]

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[2] In all the refusal-to-hire cases relied on by my colleagues except one, the respondent was put on notice that its altering of employment terms was alleged to be unlawful. It is unclear in *American Stevedoring Co.*, 280 NLRB 756 (1986), whether there was a separate 8(a) (5) allegation involving the setting of initial terms and conditions of employment, or whether the respondent was otherwise put on notice that such unilateral changes were in issue. To the extent that that case can be read to allow a remedy for the failure to bargain over initial employment terms absent a specific complaint allegation or other evidence that the respondent was put on notice that its failure to do so is being challenged, I believe it was wrongly decided and would not rely on it. See the discussion of the applicable law infra.

N.C. Coastal Motor Lines, 219 NLRB 1009 (1975), enfd. 542 F.2d 637 (4th Cir. 1976), cited by the majority, does not involve a refusal to hire and does not even involve a successorship allegation. Therefore, that case does not directly support the majority's proposition that requiring a successor to adhere to the predecessor's terms and conditions of employment is "strictly a remedial matter that does not have to be specifically alleged." Far from being "strictly a remedial matter," my colleagues' decision constitutes an attempt, under the guise of remedy, to find the Respondents guilty of an unalleged and unlitigated unfair labor practice and to impose a potentially huge financial liability. See generally *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. on other grounds 529 F.2d 516 (4th Cir. 1975).

In *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981), the court described the "applicable law" as "clearcut." The court said: "The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing." Here, not only is there no unilateral change allegation regarding the Respondents' setting their initial terms of employment, but the 8(a)(5) allegations that were alleged in the amended consolidated complaint would reasonably have led the Respondents to believe that their right as a successor to set initial terms and conditions of employment was not being challenged as unlawful.[3] Furthermore, the General Counsel's opening statement did not put the Respondents on notice that their setting of initial terms of employment was alleged to be unlawful,[4] and my colleagues do not point to any

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[3] The complaint does not allege an 8(a)(5) unilateral change violation in January 1984, when the Respondents allegedly became a successor. It does, however, allege that certain specific unilateral changes in November and December 1984 and January 1985 were unlawful. The complaint further alleges that the Respondents violated Sec. 8(a)(5) by a general refusal to bargain since January 1984, a refusal to provide information since that time, surface bargaining since May 1984, creation of the safety and progress committee in January 1984, and direct dealing since November 1984. From these specific complaint allegations it is reasonable for the Respondents to conclude that the General Counsel was not contesting their right to set their initial terms and conditions of employment in January 1984.

[4] On the contrary, the General Counsel's opening statement alludes to the Respondents' use of their hiring interviews

(Continued on following page)

other portions of the transcript of the hearing that would establish such notice.

Rather, my colleagues' position is that an unlawful unilateral change allegation "is subsumed in the broader 8(a)(5) and 8(a)(3) allegations and violations involved in this case." I disagree. With regard to the general refusal-to-bargain allegation, it must be remembered that the *Burns*[5] successor who cannot set its own terms is the exception, not the general rule. Thus, in my view, notice about a unilateral change allegation cannot be implied from a mere successorship allegation. Nor are the 8(a)(3) allegations a substitute for such notice.[6] An 8(a)(5)

(Continued from previous page)

to establish new terms and conditions of employment before they brought the employees back on board. The General Counsel did not, however, state that this was alleged to be unlawful. Indeed, on the basis of the facts as stated by the General Counsel, it would appear that the setting of initial terms by Respondents was entirely lawful. See the summary of the case law in *Starco Farmers Market*, 237 NLRB 373 (1978) (in which the new employer's offer of different terms and conditions of employment is prior to or simultaneous with the offer of employment to the predecessor's employees, the Board finds no duty to bargain over initial employment terms).

[5] *NLRB v. Burns Security Services*, 406 U.S. 272, 294 – 295 (1972).

[6] *NLRB v. Marin Operating*, 822 F.2d 890 (9th Cir. 1987), enfg. 279 NLRB 481 (1986), cited by the majority, is a successorship case that did not involve any refusal-to-hire allegations. Therefore, it does not directly support the majority's claim that the 8(a)(3) and (5) allegations of the complaint provided the Respondents with sufficient notice.

unilateral change violation does not inevitably follow every time an alleged successor commits any refusal to hire violation. This is particularly true in a case such as this one in which the refusal to hire did not involve the entire unit.[7] Under the "applicable law," *Blake Construction*, supra, the Respondents remain entitled to notice of precisely what violations they allegedly committed.

The court's conclusion in *Blake Construction* is equally applicable here: "Elemental procedural due process prevents [the] . . . granting . . . of remedies that go beyond the scope of the complaint and are directed toward violations of the Act not noticed or actually tried before the ALJ or the Board."[8]

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[7] I note that all the cases relied on by my colleagues involve instances in which the refusal-to-hire violations extended to all or virtually all the available unit positions. Here, there is no such link between the refusal-to-hire violations and the Respondents' status as successor. In this case, quite apart from the 34 refusal-to-hire violations they committed, the Respondents became a successor as a result of their hiring more than 200 employees of the predecessor. Whether the Respondents unlawfully set initial employment terms depends on what was said in the employment interviews with those employees, a matter not pursued in the complaint or litigated at the hearing. If the Respondents had been put on notice that the General Counsel was challenging their right as successor to set initial terms, the Respondents could have defended by introducing evidence showing that in the interviews that resulted in the hiring of more than 200 employees of the predecessor, it "clearly announce[d] its intent to alter terms and conditions prior to offering employment to incumbent employees." *Starco Farmers Market*, supra, 237 NLRB at 373. See fn. 4, supra.

[8] 663 F.2d at 283.

Accordingly, absent a complaint allegation or other evidence that the Respondents were put on notice that the January 1984 setting of initial terms and conditions of employment was alleged to be unlawful, I would not require the Respondents to reinstate the predecessor's terms and conditions of employment as a remedy for the violations found in this case.[9]

Dated, Washington, D.C. April 17, 1989

Mary Miller Cracraft, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[9] In all other respects, I agree with my colleagues' decision, except that in adopting the judge's finding that the Respondents bargained in bad faith, I would not rely on the Respondents' insistence on having negotiations away from the plant and outside work hours, their position that any contract negotiated might be temporary based on the outcome of court proceedings, and their rejection of mediation.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with International Union, Allied Industrial Workers of America, AFL-CIO, and its affiliated Local, Local 879, Allied Industrial Workers of America, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full time production and maintenance employees of the Hartford, Wisconsin plant, except executives, office and clerical workers, salesmen, shop superintendents, supervisors, engineers, nurses, first-aid attendants, guards, temporary summer/seasonal employees, any employee in training for the foregoing and all other employees having the right to hire and discharge.

WE WILL NOT refuse to give information to the Union that is reasonably related to the Union's function as collective-bargaining representative and in furtherance of the Union's obligation to process grievances for employees.

WE WILL NOT unilaterally change wages, hours, and other conditions of employment without bargaining

about these changes with the Union and WE WILL NOT bargain with individual employees concerning such changes.

WE WILL NOT engage in collective bargaining, soliciting and discussing employee grievances with, and meeting with the safety and progress committee, and WE WILL NOT pay employees for serving on that committee.

WE WILL NOT refuse to hire unit members of our predecessor, or otherwise discriminate against employees, to avoid having to recognize and bargain with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of the unit employees with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

WE WILL furnish the Union with any and all information requested by it and reasonably related to its function as collective-bargaining representative.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately before our takeover from Chrysler Corporation of the Hartford, Wisconsin operations, and WE WILL retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, and WE WILL make employees whole by

remitting all wages and benefits that would have been paid absent such unilateral changes from January 23, 1984, until we negotiate in good faith with the Union to agreement or to impasse. Provided, however, that nothing herein shall be construed as requiring rescission of any wage increase or other benefits that previously have been granted to unit employees.

WE WILL reimburse employee-members of the Union's negotiating committee for any wages they lost while attending past negotiating sessions, with interest.

WE WILL offer to unit employees of the predecessor, who would have been employed but for our unlawful discrimination against them, including those listed below, immediate and full employment, without prejudice to their seniority and other rights and privileges previously enjoyed, discharging if necessary any employees hired in their place.

George J. Riege
Brian F. Kuehl
Edward Becker
Eleanor C. Heimermann
Russell F. Thompson
Barbara A. Hopfensperger
Janet A. McFadden
Doris Koepke
Alvah P. Ostrander
Roy C. Maher
Victoria S. Krueger
Jean D. Whitish
Merlin V. Nelson
L. O. Schroeder
Judith A. Wagner
Duane A. Whitish
Harvey W. Grulke
Michael S. Beckwith
Frank Schaeffer
Charles Deis
Velora Shilts
Geraldine A. Prusik
Ervin C. Margelowsky
Richard Wingelman
Barbara Constantineau
Diane G. Thom
Deloris M. Bunker
Mary A. Bilgreen
Timothy Noble
Otto Quandt
Carol M. Schumacher
Rochelle M. Schmidt
Warren K. Moritz
James Schwickert

WE WILL make the above-named employees whole for any loss of earnings and benefits they may have suffered by reason of our unlawful refusal to employ them, with interest.

U.S. MARINE CORPORATION
AND BAYLINER MARINE
CORPORATION

_____
(Employer)

Dated ___ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 W. Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203-2211, Telephone 414 – 291-3866.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

U.S. MARINE CORPORATION AND BAYLINER MARINE CORPORATION	Cases 30-CA-8206 30-CA-8404 30-CA-8537
and	
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, and its AFFILIATED LOCAL, LOCAL UNION 879, ALLIED INDUSTRIAL WORKERS OF AMERICA	

Paul Bosanac, Esq. of Milwaukee, Wisconsin, and *Katharine Colgan, Esq.*, of Washington, D.C., for the General Counsel.

Fred G. Groiss, Esq. and Carolyn Gnaedinger, Esq. (Quarles & Brady), of Milwaukee, Wisconsin, for the Respondent U.S. Marine Corporation.

Warren Ogden, Esq. (Williams, Lanza, Kastner and Gibbs), of Bellevue, Washington, for the Respondent Bayliner Marine Corporation.

Kenneth R. Loebel, Esq. (Habush, Habush & Davis), of Milwaukee, Wisconsin, for the Charging Unions.

Peter Stone, Esq. (Whyte & Hirschboeck), of Milwaukee, Wisconsin, appearing specially to represent Chrysler Corporation.

Decision

GEORGE F. McINERNY, Administrative Law Judge: This proceeding is based upon charges filed on 2 February 1984 in Case No. 30-CA-8206 by International Union, Allied Industrial Workers of America, AFL-CIO, and its affiliated local, Local Union 879, Allied Industrial Workers of America, herein individually referred to as the International and Local 879 and collectively as the Union. This charge was amended by the Union on 27 February 1984, and on 28 February 1984 the Regional Director for the 30th Region of the National Labor Relations Board, herein referred to as the Board, issued a Complaint alleging that U.S. Marine Corporation, a wholly owned subsidiary of Bayliner Marine Corporation, herein referred to separately as U.S. Marine, and Bayliner, or collectively as Respondents, had violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.*, herein referred to as the Act.

On 2 March 1984, an Answer was filed on behalf of Respondent U.S. Marine, in which it was alleged that U.S. Marine is a Wisconsin corporation, the stock of which is owned by the same individuals who own the stock of Bayliner, and otherwise denying the commission of any unfair labor practices.

On 2 July 1984, Local 879 filed the charge in Case No. 30-CA-8404, and on 1 October, it filed the charge in Case

No. 30-CA-8537. A Complaint in Case 30-CA-8537 issued on 10 December 1984, naming the Respondent as "U.S. Marine Corporation, an affiliate of Bayliner Marine Corporation." The Answer herein denied the commission of any unfair labor practices. On 19 June 1985 another Complaint issued, this time in Case 30-CA-8404, again naming U.S. Marine as an "affiliate" of Bayliner and on 19 June all three cases, 30-CA-8206, 30-CA-8404 and 30-CA-8537 were ordered to be consolidated by the Acting Regional Director for the 30th Region. An Answer was filed in Case 30-CA-8404, again denying the commission of any unfair labor practices.

Finally, on 21 August 1985, the Acting Regional Director issued an amended consolidated Complaint combining all of the allegations in the prior Complaints, and this time alleging that U.S. Marine and Bayliner are "Single, and/or joint Employers." To this, U.S. Marine and Bayliner, each represented by different counsel, filed separate Answers, denying that they are single employer, or joint employers, and denying the commission of any unfair labor practices.

Pursuant to notice contained in the aforesaid amended consolidated Complaint, a hearing was held before me in Milwaukee, Wisconsin on 16 September, 14-18 October, 21 October, and 18 and 19 November 1985, at which all parties were represented by Counsel and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the close of the hearing, all

parties submitted briefs, which have been carefully considered.[1]

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[1] Under date of 22 May 1986, the Charging Unions here filed a Motion for Leave to Reopen and Supplement the Record herein. The General Counsel supports this motion and the Respondents oppose. The reasons advanced by counsel for the Charging Unions as to why I should reopen the instant hearing arose during a hearing before the Honorable Terence T. Evans, United States District Judge for the Eastern District of Wisconsin. The Judge held a hearing in connection with a petition by the Board to adjudge Respondents in contempt of the court's 10 May 1984, injunction and Order to bargain collectively with the Unions. The evidence sought to be introduced here includes minutes of several Safety and Progress Committee meetings, and some exchanges of correspondence between the Union and Respondents early in 1986. These documents allegedly "shed additional light on the Respondent's motions" as well as show additional violations of Section 8(a)(1) and (5) of the Act.

The General Counsel agrees with the substance of this motion, but fails to move to amend the Complaint herein.

I have reviewed the Motion, the support of it by the General Counsel and the opposition by counsel for U.S. Marine. The minutes of the Safety and Progress Committee are, like other minutes of that committee I have hitherto refused to admit into evidence, cumulative and unnecessary to this decision. Further, the allegations of additional unfair labor practices are repetitive and redundant, merely constituting continuations of conduct already alleged in the original complaint as violations of Section 8(a)(1) and (5). In any event, the remedy which I could fashion for these alleged additional violations is identical with that I will recommend here. Finally, my reading of Judge Evans' Decisions in the original case and in this contempt action indicates no inconsistency, but rather mutual

(Continued on following page)

Based upon the entire record, including my observations of the witnesses, and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

A. Bayliner

In its Answer to the Complaint, Bayliner denied that it is a Delaware corporation, that it had an office and place of business in Hartford, Wisconsin, and that it is engaged in the manufacture and sale of power boats. The General Counsel introduced a certified copy of a Certificate of Incorporation of Bayliner Marine corporation showing that the Company was incorporated as a Delaware corporation on 20 November 1972. In the absence of conflicting evidence, I find that Bayliner is a Delaware corporation. The evidence shows that there is no question that Bayliner is engaged in the manufacture and sale of power boats. The denial of the portion of the Complaint which alleged this fact apparently was an oversight on the part of Bayliner's counsel. The question of whether Bayliner has or had a place of business in Hartford will be discussed, below, in section III A.

(Continued from previous page)

support and agreement. That Court's remedies are somewhat different than those I am empowered to recommend, but I think they will supplement each other without conflict or duplication.

The Motion is, accordingly, denied.

The Answer admitted and I find that Bayliner is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

B. U.S. Marine

The Answer filed by U.S. Marine admitted, and I find that U.S. Marine is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

The Complaint alleges, the Answers admit, and I find that the International Union, Allied Industrial Workers of America, and its Local 879, are labor organizations within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. The Sale of the Plant

The plant involved here is located in Hartford, Wisconsin and consists of a number of buildings, some interconnected and some free-standing, built between 1912 and 1972, and containing altogether about 655,000 square feet. The plant was purchased by the Chrysler Corporation in 1965, and was used for the manufacture of outboard motors and two-cycle industrial motors. By the early eighties Chrysler's biggest customer for outboard motors was the Seattle-based Bayliner Marine Corporation.[2] In 1981, Bayliner inquired of Chrysler about the

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[2] Chrysler also sold outboard motors directly to independent dealers, and also manufactured a line of motors for the Montgomery Ward Company.

possibility of purchasing the outboard manufacturing facility, but apparently that was not pursued.

In 1983, the Chrysler Corporation decided to sell the Hartford facility, and contacted Bayliner as a prospective purchaser.

Harold J. Daumler, Jr., former Manager of Asset Studies for Chrylser, testified that he had been involved in the sale of various Chrysler operations, including Chrysler Marine Corporation, the operating division at the Hartford facility.[3] Negotiations between Chrysler and Bayliner were extended and, at times, acrimonious. Aside from questions about the price for the facility, and whether Bayliner would purchase the stock of Chrysler Marine, or merely the assets, a major point of contention was the disposition of the people employed at the plant.

On this latter question, Chrysler was anxious about the fate of the current employees, not so much out of consideration for the welfare of those employees, but because of the prospect of liability under its union contracts for enormous sums of money in severance pay and supplemental unemployment benefits. Bayliner, on the other hand, acted in a manner throughout these negotiations which seemed to indicate a desire to keep all of its

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[3] Chrysler Marine also operated a plant in Beaver Dam, Wisconsin, and the discussions for the sale concerned both plants during the negotiations but the Beaver Dam plant was not included in the final agreement for the final sale of the Hartford plant.

options open.[4] Notwithstanding this attitude, it was evident from the testimony of Daumler, and that of James W. Hoag, Bayliner's Vice-president for Administration, who also became the General Manager at the Hartford plant that it was Bayliner's intention to begin its own operations at Hartford as soon as possible after the sale. Daumler quoted Donald Saunders, the corporate Secretary Treasurer and one of the principal stockholders of Bayliner, as saying sometime in the fall of 1983 that Bayliner planned to hire at least 85 percent of the Chrysler employees. In a telephone conversation on 26 September 1983 between Daumler and Christopher Steffan, a Chrysler Vice-president on one end, and J. Orin Edson, Bayliner's Chairman and principal stockholder, on the other, Edson was quoted as saying that Bayliner would offer the employees its own "plans and programs" to replace those in effect under Chrysler. The implication which I read into these statements is that, at that time, Bayliner wanted to start up production as quickly as possible, and in order to do so, it would have to rehire enough former Chrysler employees who possessed the necessary skills and experience to enable an effective production schedule to be immediately established.

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[4] My findings on the subject of the negotiations and sale of the Hartford plant are based upon the credible and undenied testimony of Daumler and Chrysler's Associate General Counsel, Leroy C. Richie, and upon documents introduced through these witnesses. After my denial of its motions to sever or to dismiss, and without any notification to me, Bayliner and its counsel chose, voluntarily, to absent themselves from this hearing.

Despite some disagreements, the terms of the sale were finally worked out late in November. In a memorandum requesting approval of the sale submitted by Chrysler's Management to its Board of Directors on 8 December, a description of the terms of the sale included the comment that "Bayliner will make no commitment to offer jobs to all current employees but expects to employ at least 85 – 90 percent of the present work force." The Board duly approved the sale, and the transaction was to be effective as of 30 December 1983.

At this point, Local 879 and its International Union filed suit in the United States District Court for the Eastern District of Wisconsin in Milwaukee (Civil Action No. 83-C-1983), against Chrysler Marine Corporation, and Chrysler Corporation, seeking to enjoin the sale as being in violation of contractual requirements that the Unions be given 6 months advance notice of the closing of the Hartford plant, and that the Company negotiate a severance pay plan.[5] With the filing of the suit, Chrysler dispatched Associate General Counsel Leroy C. Richie to Milwaukee to do what he could to clear the matter up. Richie called Edson and asked him to support Chrysler's position by having someone from Bayliner testify or execute an affidavit that the latter company intended to hire a majority of former Chrysler employees. Edson refused to support Chrysler's position in a conversation which Richie described as "surprising" and "not pleasant."

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[5] Chrysler's internal documents, in evidence here, show that their labor relations people felt that Bayliner's commitment to continue operations for a year would render these contractual provisions inapplicable.

Richie then instructed Daumler to prepare a memorandum including language, which Richie told Daumler to put within quotation marks as accurately representing the substance of what Edson had said. The memorandum noted that Bayliner officials had said throughout the negotiations that they expected to hire a majority of the present employees as they would be needed to run the plant, and then reneged on an agreement to support that position in the Federal Court. The memorandum continued: "It was not until a day two prior to the December 28 hearing that you (referring to Edson) indicated that you never had any intention of recognizing or even negotiating with the Union. "Now it would appear that your intention is to hire less than 50 percent of the current employees. Therefore, the liability for employee severance is going to run in the millions. Had we known this we would have structured the deal to avoid this liability. Your misrepresentation has caused us this substantial damage." Daumler then called Edson and read this language to him. Daumler did not recall what Edson said but remarked that it was "so minimal as to be insignificant."

Richie was a careful witness, but I found his testimony, particularly his clear, positive assertions on cross-examination that the substance of the memorandum that he had Daumler prepare was in fact, what Edson had said to him, to be candid and credible. Thus, I find that sometime between September and December, Bayliner made a determination that it would not honor its agreement with Chrysler to hire 85 – 90 percent of the former Chrysler employees; and that Edson stated to Richie that Bayliner intended to hire less than 50 percent of its work force from among former Chrysler employees.

It may be noted that Hoag did in fact make an affidavit to be used in the Union's lawsuit, but that affidavit carefully avoids any statement that Bayliner intended to hire a majority of former Chrysler employees, stating merely that Bayliner was required under the terms of the agreement with Chrysler to operate the plant for a period of not less than one year. The District Court issued an injunction forbidding the sale, but I was informed by the parties that that decision was reversed by the United States Court of Appeals for the Seventh Circuit. The sale then went forward and Chrysler closed its doors on 13 January 1984.

B. The Corporate Succession

Bayliner Marine Corporation was founded in 1955 as a retail dealership called Advance Outboards. In 1966 or 1967, the company began to manufacture boats under the name of Puget Plastics, and in 1972 was incorporated under its present name of Bayliner Marine Corporation. It is a Delaware corporation headquartered in Arlington, Washington,[6] which is entirely owned by four shareholders: J. Orin Edson, Vinton H. (Slim) Sommerville, David Livingston and Donald Saunders. As of October 1985, and at other times material herein, Edson was the Chairman of Bayliner, Sommerville the President, Saunders the Secretary and Treasurer, and Livingston the Vice-President. In addition to these four individuals, the Board of Directors of Bayliner also includes Lennox

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[6] The Complaint herein was amended at the hearing to reflect the fact that Bayliner's headquarters is at Arlington, Washington, instead of at Hartford, Wisconsin.

Black, of Limerick, Pennsylvania, John Hughes, of Seattle and Terry Picken of Bellevue, Washington. By 1985, Bayliner was operating 13 plants throughout the United States engaged in the manufacture of fiberglass-hulled power boats ranging from 14 to 45 feet in length. There are no unions which represent any employees at any of these 13 plants.

In connection with the purchase of the Chrysler outboard operation, the managers of Bayliner decided that the newly acquired plant would not operate under the Bayliner name, but that a new corporation, to be known as U.S. Marine Corporation, would be created and incorporated under the laws of the State of Wisconsin. This was duly accomplished, and the new company was established on 15 December 1983. The shareholders and directors of U.S. Marine are the same as those of Bayliner but the officers' chairs have been shuffled around somewhat, Edson being the President, Livingston the Vice-President, Saunders the Secretary, and Sommerville the Treasurer.

After the finalization of the sale from Chrysler to Bayliner for a total amount of $14.8 million, Bayliner assigned the plant, real estate and all other assets to U.S. Marine for a sum estimated by Bayliner attorney Donald C. Cramer as $10.00.[7] This done, Bayliner then directed its Vice-President for Administration, James W. Hoag, to

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[7] Neither Cramer's demeanor, nor his testimony about his first knowledge of these proceedings, inspired much confidence on my part as to his truthfulness, but, in the absence of any other evidence, I do credit this statement that Bayliner assigned the Hartford operation to U.S. Marine for a nominal sum.

run the new company. Hoag is an attorney who had been Vice-President for Administration for Bayliner since September 1982. In that position he had responsibility for human resources and legal services including all personnel functions, training, compensation and record keeping for all of the 13 Bayliner facilities. Hoag reported directly to Vice-President David Livingston. As of 16 January 1984, Hoag was made General Manager and chief operating officer of U.S. Marine, where he remained at least until the close of this hearing in November of 1985. During this time, however, Hoag retained his title with Bayliner, and was paid by Bayliner, not by U.S. Marine.

After Hoag assumed control of the new company, his first task was the hiring of a work force, and steps to do this were instituted even before the closing of the plant by Chrysler on 13 January 1984. Coupled with the hiring process itself, which will be discussed in detail below, was the concurrent establishment of new wage rates, other conditions of employment, and certain operational changes in manufacturing processes, principally involving the reduction in the number of models to be produced.

Both Bayliner and U.S. Marine maintained throughout the hearing, and in their separate briefs, that U.S. Marine and Bayliner are not a single or joint employer under the Act. Bayliner's brief, indeed, is devoted solely to this issue. The question of whether or not they are separate, independent entities or are a single or joint employer depends upon the application of the four criteria established by the Supreme Court in *Radio and Television Broadcast Technicians Local 1264 v. Broadcast Service of*

Mobile, Inc., 380 U.S. 255 (1965): Interrelation of operations; common management; centralized control of labor relations; and common ownership; *American Stores Packing Company, a Division of Acme Markets, Inc.*, 277 NLRB No. 190 (1986).

With respect to the first criterion, interrelation of operations, it is true that Bayliner is a manufacturer and seller of boats and U.S. Marine is a manufacturer and seller of outboard motors and industrial motors. It is also true that Bayliner is a Delaware corporation and U.S. Marine is a Wisconsin corporation.[8] The evidence shows, however, that Bayliner did not treat with U.S. Marine at arms length. The whole Chrysler Hartford operation which Bayliner had just purchased for $14.8 million was assigned and transferred to U.S. Marine for a sum thought by Donald Cramer to be $10.00. Later Bayliner transferred machines, tools, designs and patents for a stern drive engine to U.S. Marine. Hoag did not recall whether or not there was any consideration paid for this transfer. Bayliner is U.S. Marines' largest customer and there was no testimony that Bayliner paid market rates for motors and engines purchased from U.S. Marine. I can draw no inferences from this, but it can and must be inferred from these facts that U.S. Marine is wholly a creation of Bayliner;[9] that Bayliner organized U.S. Marine

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[8] Hoag testified that one of the reasons for the choice of Wisconsin as the state of incorporation for U.S. Marine was tax considerations. He was not asked, nor did he say what the other reasons may have been.

[9] Having the same persons as directors, officers and stockholders.

and gave the plant and all its assets to U.S. Marine; that Bayliner, in effect, gave the stern drive operation to U.S. Marine; and that Bayliner is the largest single customer of U.S. Marine. It is further inferred that the two corporate entities are vertically integrated, one with the other. This inference is reinforced from the fact that the reduction in the number of types of outboard motors and the numbers of those motors to be produced by U.S. Marine was all determined by Bayliner even before the sale from Chrysler was completed,[10] and, according to U.S. Marine's brief, estimates of U.S. Marine employment levels were determined by reference to Orin Edson's estimates of how many motors Bayliner would require from U.S. Marine.

The fact of common management does not need to be inferred, but is apparent from the fact that the officers of one were the officers of the other.[11] At the next lower level, the actual operation of U.S. Marine was directed by Jim Hoag, a Bayliner Vice-President. Thus, while there is evidence that Hoag actually exercised management functions at Bayliner while he was on assignment to U.S. Marine, the fact that he held his Bayliner title and salary,

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[10] See letter from Hoag to Chrysler employees dated 8 December 1983.

[11] While Edson, Summerville, Saunders and Livingston held different offices in the two corporations Hoag admitted that since these four men owned all the stock of both, they could call themselves by any title they wanted.

and that, even after finally returning to Bayliner in the fall of 1985, he again came back as General Manager of U.S. Marine because of his successor's legal problems shows that he was considered an interchangeable element in the common management of the two enterprises.

There is, of course, no question of common ownership here since the same four individuals own all of the stock of both operations.

With respect to centralized control of labor relations it must be noted that we are dealing here with two dissimilar situations involving labor-management relations. There are not, or were not at the time of this hearing, any unions at any of Bayliner's 13 plants. At Chrysler there had been a union and a union contract, leaving U.S. Marine, when it took control of the former Chrysler facility, facing the situation we have in this case.

As I have indicated, Hoag was given the responsibility late in 1983 to hire a staff to recommence production following the closing of the plant by Chrysler, and given authority to develop a wage and benefit package for these new employees. Hoag testified that he had "independent authority" to establish these wage and benefit packages, but he also indicated that he consulted with Livingston and Saunders as well as Herb Hackbarth, former personnel manager for Chrysler.[12] There is no question but that Hoag was the officer responsible for the

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[12] Hackbarth had been Personnel Manager of Chrysler for some years before 13 January 1984, and then stayed on with U.S. Marine until he retired on 31 May 1984.

implementation of labor relations policies at U.S. Marine from the time U.S. Marine assumed control of the Hartford plant until at least the time of this hearing. There is a great deal of evidence concerning these labor relations policies which will be discussed in various sections in this decision.

There is, however, very little evidence, and no direct evidence, on Bayliner's labor relations policies. Hoag, who was in a position to know what those policies were since he had administered them during 1972 and 1973, testified only in general terms about his duties at Bayliner, and did not explain what personnel policies were in effect there and then. Bayliner, having failed to attend the hearings, or to submit any evidence on this subject, must, perforce, suffer me to draw what permissible inferences I may from the record I have before me.

These facts show a clear line of derivation from policies and practices of Bayliner to those of U.S. Marine.

At the outset we have the fact that Hoag's experience with personnel and labor relations policies must be based upon his experience at Bayliner. As far as I can tell from his testimony his only experience in the personnel and labor relations was in his capacity as Vice-President for Administration at Bayliner from 1972 to 1974. I would infer then, that in the absence of evidence that he was using other sources, Hoag drew upon his experience at Bayliner, and the policies and practices with which he was there familiar, in formulating and implementing policies and practices at U.S. Marine.

This inference is borne out by the evidence. Even before the sale of Chrysler was finally agreed upon, we

find Edson, in a telephone conversation on 26 September 1983 with Christopher Steffan and Harold Daumler stating that Bayliner planned to "offer the people our own plans and programs to replace yours." Later, Edson expressed concern that Bayliner's intention to implement a "group incentive compensation system at the Hartford plant might provoke a strike by the incumbent Union.

In his communication to Chrysler employees on Bayliner's letterhead, and dated 8 December 1983, Hoag told them that Bayliner had purchased Chrysler's "Marine and Industrial Products Operations."[13] Hoag's letter went on to say that Bayliner was organizing an affiliated company called U.S. Marine and promised the employees that management would "be applying the same philosophies that made Bayliner an industry leader, including the belief that efficient teamwork is one of the keys to success." This last sentence can only refer to the application of Bayliner personnel policies and practices to the employees of U.S. Marine.

In a letter dated 13 December 1983 to Chrysler dealers, under the U.S. Marine letterhead, Sommerville stated (signing as President of U.S. Marine[14]), "Everyone

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[13] This was before the Union's lawsuit against Chrysler, the injunction and the separation of the Beaver Dam plant from the Hartford operation.

[14] Sommerville, of course, was President of Bayliner and Edson was President of U.S. Marine, but as I have noted, the four sole stockholders of both companies could call themselves anything they wanted.

at Bayliner Marine Corporation and all the new people who will be hired for the U.S. Marine Engine Company are here to serve you and make this the most successful engine program in the country." The meaning of this is that Bayliner and its four owners considered that the two companies were united in service to its dealers and customers.

An employee handbook prepared by Hoag, using a Bayliner handbook as a model, and distributed to all employees of U.S. Marine, states that U.S. Marine is an "affiliate of Bayliner the world's largest pleasure boat manufacturer. U.S. Marine will operate using the same successful formula developed by Bayliner;" – "Bayliner and U.S. Marine Corporation are owned and operated by people who work everyday in the business. The owners devote their effort and investment to these two businesses exclusively and are committed to making U.S. Marine a success and a great place to work."

The handbook stated that "Bayliner recognized many years ago that a retirement-savings plan was needed for its employees and determined that the plan should accumulate a cash value to the employee. We established the Bayliner Marine Profit Sharing Trust of which all eligible U.S. Marine employees automatically become members." As it turned out, U.S. Marine eventually set up its own Profit Sharing Trust. However, the terms were the same, and the Trustees were the same, in both Trusts. The Trustees were Orin Edson and Donald Saunders.

During the collective bargaining negotiations which took place in 1984, Hoag stated on two occasions, as

preserved in the Company's notes, that Bayliner's policies would prevail if there was a conflict between those maintained by Bayliner and those sought by the Union in negotiations with U.S. Marine.

Despite Hoag's protestations that he alone formulated labor relations policy for U.S. Marine, he admitted that he consulted with Livingston and Saunders in the development of the initial wage package implemented on the reopening of the plant on 23 January 1984; that he consulted with the four owners of the Company before deciding not to appeal the injunction ordering U.S. Marine to bargain with the Union in May of 1984; that he continually consulted with the owners of U.S. Marine and Bayliner about the Union situation at U.S. Marine, and about the progress of this hearing. Finally, the evidence shows that on beginning production at Hartford, in which all employees were required to participate, U.S. Marine instituted a mandatory system of Safety and Progress Committee, again modeled upon those in existence among employees of at least two other Bayliner plants.

It is apparent from all this that the owners of Bayliner and the creators of U.S. Marine intended to, and did, place into effect the same policies and procedures which the owners had found to work successfully at other Bayliner plants. This is a consistent pattern not contradicted by any testimony or documentary evidence, and I find that Bayliner and U.S. Marine have during all times material here shared a common labor relations policy.

Accordingly, I find that Bayliner and U.S. Marine are commonly owned, have interrelated operations, share common management and centralized control of labor

relations, thus constituting a single employer. *Albritton Communications, Inc.*, 271 NLRB 201, 218 (1984); *Truck and Dock Services, Inc.*, 272 NLRB No. 93 (1984); *Las Villas Produce, Inc.*, 279 NLRB No. 120 (1986).

C. The Hiring Process

Chrysler employed about 262 production and maintenance employees at the time it closed the plant on 13 January 1984.[15] All of these employees were terminated at that time, and were notified that if they wished to be considered for employment by U.S. Marine, they should file applications with the Wisconsin Department of Industry, Labor and Human Relations, known as the Job Service, or DILHR. In his letter to the Chrysler employees dated 8 December 1983, Hoag asserted that Bayliner/U.S. Marine would be "hiring the best qualified individuals from the local area. You, as an employee of Chrysler, are encouraged to apply for work with U.S. Marine." Hoag also notified the Job Service to send all former Chrysler employees who filed applications to the Company for interviews without any preliminary screening required of other applicants. To conduct the interviews for former Chrysler employees as well other applicants, Hoag brought in five Bayliner executives, Allen McKay from

[15] In referring to former Chrysler employees throughout this decision I am referring to those 262 employees who were working at the time of the closing of the plant, not to employees who may have worked for Chrysler sometime in the past.

Bayliner's Arlington location; Robert Hill, facilities engineer at Arlington; Gary Klement, plant manager at Valdosta, Georgia; Ron Cooley, senior vice-president for manufacturing at Arlington; and Richard Hammond, human resources manager from Arlington. Hoag testified that he himself did some interviewing.

The interviews were scheduled for the week following the shutdown of the plant on 13 January 1984. Hoag stated that interviews for the former Chrysler employees were set for the first 3 days of that week, with other applicants scheduled for the last 2 days.[16] The interviewers had been briefed by a labor consultant in Arlington before coming to Wisconsin, and were further briefed by Hoag on the Sunday night before the interviews were to take place. The interviewers were told to ask questions relevant to the job, and to make sure to ask no questions which could be considered discriminatory in regard to age, handicaps, sex, marital status or union activity. Hoag reviewed with them the topics they should discuss, including the types of machines the applicants ran, the tolerances they were used to, and their versatility and flexibility with respect to future job assignments. The interviewers were given copies of the Bayliner employee handbook, later used as a model for a U.S. Marine employee handbook, and were told to discuss wages and working conditions with the applicants.

Following the interviews, the scenario for the hiring process called for those not obviously disqualified to be

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[16] Hoag projected that 230 jobs would be filled after this round of interviews, during which about 500 applicants, both former Chrysler and non-Chrysler employees were interviewed.

referred for physical examinations to a group of nurses also apparently brought in from Bayliner locations.[17]

Each evening after the interviews ended the interviewers and the nurses discussed the interviews with Hoag, who had sheets showing the names of the day's applicants. Hoag did not tell the interviewers what criteria he was looking for, but did discuss the interviews with the interviewers and the physical abilities of the candidates with the nurses.

An additional step in the process was a daily consultation in that week of 16 January between Hoag and three former Chrysler executives who remained on the payroll of U.S. Marine; Herbert Hackbarth, the personnel manager, Harvey Bulgrin, former plant manager and John Smith, former production manager. These individuals rated all of the applicants on a scale of one to three, one being the lowest mark, and gave these ratings to Hoag. Hoag then considered all this information and made the decisions on those who would be hired, and those who would not, without further consultation with the interviewers, the former Chrysler officials, or anyone else. Those selected for hire were notified to report for work on 23 January, when the plant reopened under the management of U.S. Marine. At that time 219 employees had been hired, all of whom were former Chrysler employees.

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[17] The process was hobbled, so far as I can determine, by the fact that all of the Chrysler employees' employment and medical records had been bundled up when the plant closed on 13 January, and sent off to Chrysler's headquarters in Detroit. These records were unavailable to U.S. Marine through no fault of its own.

By 25 January, 12 more employees had been hired, among whom were three former Chrysler employees. One more former Chrysler worker was hired on 30 January, making a total of 223 former Chrysler workers on the payroll as of that date. Between the 25th and the 30th, an additional 29 non-Chrysler employees were hired, making a total, as of 30 January, of 261 employees. Employment records maintained by U.S. Marine show that from 23 January to 31 August 1984, the total employment ranged from 219 to 323, stabilizing in the period between April and August at 312 to 323. During this whole period the number of former Chrysler employees varied from a high of 223 to a low, as of 31 August 1984, of 218.

As has been noted, no former Chrysler employees were hired after 30 January 1984. Of 258 former Chrysler employees who applied for employment with U.S. Marine as shown by the evidence here, 34 were not rehired.

When one looks at these facts, two differing perspectives emerge, the first pointing toward the allegations in the complaint dealing with U.S. Marine's failure to recognize the Union, and the second with the refusal to rehire 34 former Chrysler employees. I will deal with these two broad issues in that order, but would note that they are interrelated to some extent, and they will be cross-referenced herein at appropriate points of contact.

D. The Refusal to Recognize the Union

The Union was aware, during the negotiations between Bayliner and Chrysler, of the possible disadvantages to its members and itself resulting from the sale of

the Chrysler Marine operation. In the Union's last collective-bargaining agreement with Chrysler, the parties included a side letter, dated 30 June 1983, providing for 6 months notice of the closure of the Hartford and the Beaver Dam plants and for the negotiation of a severance pay plan. This provision was, of course, part of the reason why Chrysler officials, including Leroy Richie, were so concerned about Bayliner's equivocal stand on rehire of the Chrysler employees late in 1983. It was this provision, also, which led to the Union's attempt to block the sale in December of that year.

On 13 December, Hoag and Herbert Hackbarth met with Local 879 President Donald L. Griffin, Robert Johnson, Regional Director for Region 9 of the International, and John Neff, a Staff Representative for Region 9. According to Hoag's testimony, which was in agreement with that of Griffin, Hoag informed the Union representatives that Bayliner did not intend to recognize the Union, and that Bayliner would not abide by the existing agreement between Chrysler and the Union. Griffin also recalled that Hoag said that he was not interested in having a union represent the employees, and that he was too busy to deal with the Union at that time. Hoag admitted that he may have made these last two statements. I credit Griffin's testimony that the statements were, in fact, made by Hoag.

On 25 January 1984, the Union, by John Neff, wrote to Hoag, formally requesting that Bayliner and its "subsidiary," U.S. Marine, recognize the International and the Local as the representative of the Hartford employees. The letter also requested information on the names and addresses of all employees hired by "Bayliner/U.S.

Marine" with job titles and wage rates and copies of employee manuals and handbooks relating to current benefits. U.S. Marine did not respond to this letter, and on 2 February 1984, the Union filed the original charge in this matter in Case No. 30-CA-8206. During the course of events leading up to this present hearing, on 13 April 1984 the Regional Director petitioned the United States District Court for the Eastern District of Wisconsin for an injunction requiring U.S. Marine to bargain with the Union pending resolution of the underlying issues in Case No. 30-CA-8206, all under the provisions of Section 10(j) of the Act.[18]

During the District Court proceeding, it was argued by U.S. Marine, and expressed in an affidavit executed by Hoag and submitted by U.S. Marine to the Court, that U.S. Marine had prepared production forecasts in January of 1984 which "determined when we would reach a level of employment that could be regarded as a full complement for our normal operations. This led to the conclusion that as of June, 1984, we would have 460 people employed." The theory, then, upon which U.S. Marine based its contention that it was not required to bargain with the Union, was the "complement"[19] theory stated (as

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[18] Civil Action No. 84-C-498, filed 13 April 1984.

[19] In reaching my conclusions on this issue, I find it unnecessary to draw distinctions between "full complement" and "substantial and representative complement" since the decision here turns on a different issue, namely, the validity of statistics used by Respondents to establish a projected employee complement at a future time. Cf. *NLRB v. Fall River Dyeing & Furnishing Corp.*, ___ F.2d ___, 120 LRRM 2825 (C.A. 1, 1985).

dicta) in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), to the effect that the employer had no duty to recognize the Union on 25 January 1984.[20]

According to U.S. Marine's theory, it began initial operations with less than a full complement of employees. In such circumstances:

> "(W)hen a new employer hires only part of the old unit, together with others who were never part of the unit, any decision regarding the employer's duty to bargain with the Union affects the new employer, the old employees whom he has hired and the new employees who were not previously represented by the Union. The rights of all three must be considered." . . . "The 'full complement' standard of *Burns* attempts to define *when* the make up of the controlling majority is to be determined" (emphasis in original).
>
> "The problem then becomes one of defining what is meant by 'full complement.' That cannot be done by the application of a mathematical formula but only by considering the facts of each case in light of the general goal which is sought to assure majority rule within the new employer's unit as to whether and if so with what Union there must be collective bargaining" *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 612-3 (C.A. 9, 1977).

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[20] Citing *inter alia*, *Pacific Hide & Fur Depot v. NLRB*, 553 F.2d 609 (C.A. 9 1977); *Premium Foods v. NLRB*, 709 F.2d 623 (C.A.9, 1983); and *NLRB v. Pre-Engineered Products*, 603 F.2d 134 (C.A. 10, 1979).

Accurate as the Court is in *Pacific Hide* regarding its appreciation of the *Burns* standard, and in its recognition of the principle of majority rule, it is with no disrespect intended that I differ with the Court's rejection of the application of a mathematical formula to the issue. In all of these kinds of cases the result must turn on the application of arithmetic or mathematical formulas, and on the ratios between the numbers of employees employed at full complement, and the number of employees formerly employed by the predecessor employer in the appropriate unit.

As pointed out by the Court in *Pacific Hide*, the facts of each case must be examined to determine the point at which a full complement of employees is attained, or maintained, in order to assure majority rule.

In this search we must turn first to the methods used by U.S. Marine to determine when its full complement would be reached, and next to discover in or at what point that full complement was reached.

The Company's projections for the number of production employees required in a given month in the future were based, first, on estimates by the U.S. Marine accounting department, under the direction of accounting supervisor Gil Kiefer, of the numbers of various types of engines to be manufactured in that month. These numbers, in turn, were computed through surveys conducted by Bayliner marketing people.[21] These numbers

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[21] This use of Bayliner's marketing personnel from Bayliner's Arlington, Washington, headquarters, was reflected in the figures at least for the critical period from January to June, 1984.

would then be projected by Kiefer's group into a corresponding number of man hours referred to as "basic work standard" (BWS) hours. This, then, reflected a standard number of hours required to produce the estimated number of engines.

The figure was then modified by a percentage figure representing the efficiency of the work force as a whole, varying between 142 percent and 137 percent during the time covered by the estimates submitted as exhibits here.[22] A higher efficiency rating would result in a lower number of hours required to meet the required production needs. The resulting figure would then be divided by the number of shift, or production, hours in a given month (most often 168 hours, based on 21 working days) resulting in a figure representing the actual number of employees needed in what the Company referred to as "direct labor" in the month being projected.

The direct labor figure was then further modified by factoring in categories described by the Company as indirect labor, including maintenance; warehousing; including and receiving; and figures representing the manpower equivalent of "scrap," that is, waste, resulting from errors in the production process; engineering; and work orders, representing work beyond normal production schedules and maintenance functions. All of these figures were then added to the direct labor number to arrive at the number of people needed to run the factory at the estimated level of production in each month, described as the "manpower at work" figure.

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[22] January to August, 1984.

One final variable figure, the percentage of people who would be absent during that month, was applied in the formula to come up, finally, with a figure described as "manpower required."

Since the final, manpower required, figure derives ultimately, as I have described, from projected production requirements it follows that changes in the latter estimates would result in different figures for required manpower.

In exhibits entered here by the General Counsel, figures developed by Gil Kiefer on 20 January 1984 showed BWS hours of 59574 for May and 65076 for June. These figures resulted in an estimate of required manpower for May of 358 and June of 396, before adjustment for the absentee rate.[23]

Hoag testified that after these figures were developed, he added to the Kiefer figures a total of 40 additional engines for May and 90 engines for June. This raised the BWS hours for May to 60388 and for June to 67081 and the "manpower at work" figure (before adjusting for the absentee factor, from 358 to 361 in May, and from 396 to 405 in June. Kiefer's figures (General Counsel's Exhibit 32) show an absentee rate for May of 3 percent, giving a total manpower required of 372; and an absentee rate of 7 percent for June (considered a vacation month) giving a total of manpower required for that

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[23] Note the absentee rate for this estimate has obviously been removed from the chart entered in evidence as General Counsel's Exhibit 31, and replaced by absentee factor figures admitted by Hoag to be in his handwriting.

month of 433. At the same time, 31 January, the Company's employment figures showed a total of 223 former Chrysler employees on the payroll as of 31 January.

Arithmetically, based on these figures, the Union would have maintained its majority down through the month which the Company claimed represented the time when it would be employing a representative complement of employees.

However, a revised schedule was then prepared wherein Hoag replaced Kiefer's estimates of the absentee rate, based on U.S. Marine figures, with figures representing Chrysler's experience with absentee rates in the calendar year 1983. This chart (General Counsel's Exhibit 34) shows that the Kiefer figures of 3 percent absenteeism for May and 7 percent for June were replaced by Hoag with figures of 7.7 percent for May, giving a manpower requirement of 389, and 13.5% for June resulting in a total for that crucial month of 460. Under this reconstruction of Kiefer's figures, if no more of the former Chrysler employees were hired from 31 January, and if none of those who had already been hired left the bargaining unit, then the Union would not continue to represent a majority in the month of June.

Hoag gave no explanation for the revised estimate in the number of engines to be produced in May and June. He referred to no marketing forecasts which would have resulted in such round numbers of 40 additional engines in May and 90 in June. Further, his testimony on the use of the Chrysler experience is somewhat disingenuous, in that he equated the Chrysler experience where employees had up to 4 weeks paid vacation with the U.S. Marine

prospects where employees in 1984 would receive no paid vacation at all in order to justify his use of the 1983 Chrysler absentee rates.

The accuracy of the manpower requirement figures interpolated by Hoag into the formulas worked out between the marketing people at Bayliner with Kiefer and his staff at U.S. Marine, depends entirely upon Hoag's personal credibility. Hoag is not an engineer, nor a production manager, but a lawyer, involved at Bayliner with human resources and administration, not marketing, sales, or production. As noted, there is no corroborating evidence from Bayliner, or U.S. Marine, or independent sources, of why Hoag decided that 40 additional engines would be built in May of 1984 and 90 more in June. Hoag's mere assertion that these revised estimates were made as the result of Orin Edson's optimism seem to me unwarranted in the light of descriptions of Edson by Richie and Daumler as a tough bargainer, and a businessman interested in profit, not in unrealistic production goals. Edson may, indeed, be an optimist. He may have built Bayliner's business on sanguinary but unerringly accurate predictions of the public's desire to purchase power boats. But he did not appear in this hearing to tell us these things, and we must rely on the evidence we have in this record, which is that he is an owner and manager legitimately interested in making a profit from his business, and not interested in accumulating unsold outboard engines. The figures in the record here show that Kiefer estimates, based on Bayliner's projected sales figures, were much closer to actual production in May and June than were Hoag's interpolations to those figures.

Further, Hoag's projections on absentee rates, interpolating figures drawn from Chrysler's experience in the face of the different working conditions imposed by U.S. Marine on its new work force were manifestly inaccurate. Particularly, I find Hoag's testimony that his figures showed a 13.5 absentee record in June, 1984, because he thought U.S. Marine employees, having no paid vacation time under the new regime, would take as much vacation time as Chrysler employees, who were entitled to up to 4 weeks paid vacation to be strained and not believable.

Hoag also lowered the employee efficiency rate computed by Kiefer, on the ostensible basis that a rapidly expanding work force could not sustain the high level in Kiefer's estimate.

These last two estimates made by Hoag, like his estimates in production, were not borne out by the facts. Indeed, all of Hoag's revisions to the production and manpower projections made by Kiefer seem to have very little basis in objective or demonstrable fact. Hoag's estimates of the number of engines to be produced may be explained by a excess of optimism about the outboard motor business, but his manipulation of the absentee rates and the efficiency figures does not have any relation to his off-repeated insistence that production is all-important, and that Union demands which did not reflect productive use of company time would not be considered. Nor does his use of Chrysler figures for absentee estimates seem consistent either with U.S. Marine's desire to hire the "most qualified" candidates for employment, or with a realistic view of employee willingness to take unpaid vacations.

I might consider this latter view utterly naive on Hoag's part, if I had not had the opportunity to observe him carefully during his almost 3 full days on the witness stand in this hearing. He impressed me as a highly competent, no-nonsense, executive, occasionally brusque, but capable, also, of sincere warmth and charm. His grasp of the facts was good, but he did show a selective memory in certain areas, primarily in his testimony on the later collective bargaining negotiations, and in his statements to Union officers. I did not find Jim Hoag to be the type of business executive who would base production or manpower requirements on ephemeral or subjective considerations. However, in this case he chose to override the work of marketing and accounting people, not being either an accountant or a marketing specialist himself, in the end offering no logical explanation for this. The explanations he did give are inconsistent not only with the estimates he revised, and the final figures actually attained in the critical months of May and June, 1984, but are completely inconsistent with his own demonstrated and observed actions in other aspects of this case.

For these reasons I do not credit Hoag's explanations of his motives in revising the U.S. Marine estimates of production and manpower needs from January to June of 1984, and particularly for the months of May and June of that year. The most logical explanation for Hoag's actions, and the reason most in accord with the probabilities of the situation, is that the figures developed by Hoag, and applied to the January estimates for the 6-month period to follow, were intended to furnish a mathematical and statistical basis for a defense to the

Union's interest in the bargaining unit here.[24] Whether the immediate cause for Hoag's action was the filing of the unfair labor practice in Case 30-CA-8206 on 2 February 1984, is really immaterial, since Hoag was aware of the Union's continuing interest in representing the unit employees from the 13 December meeting, and the 25 January demand for recognition. Respondents' argument that U.S. Marine did not recognize the Union in January, nor until ordered to do so by the District Court, because it believed that a full complement would not be reached until June, is shown to be based upon false and misleading figures. The cases on which Respondents rely are thus not relevant to a situation where the actual figures on Kiefer's original estimates, carried forward, consistently, until June, 1984 show that the former Chrysler employees constituted a majority of the Respondents' work force from 23 January, when the plant reopened through the entire period covered by the evidence introduced at the hearing, that is, until August, 1984.

In this case there is no question that the skills used and the functions performed by the employees are the same under U.S. Marine's management as they were under Chrysler's. The business continued in the same plant as it had before, using the same supervisory and clerical staffs as it had before. The products sold

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[24] At this point, however, I do not see that the interests of justice will be served by my recommending to the General Counsel, or to the Board, that this matter be turned over to the Justice Department for consideration under 18 U.S.C. 1001 *et seq.*.

remained the same,[25] as did the equipment and methods of production. The primary customers for the products of the Hartford plant remained basically the same, Bayliner as the primary customer, with other dealers as soon as they could be persuaded to handle U.S. Marine engines.

In the light of all these circumstances Respondents' defense that a full complement of employees had not been hired as of 25 January 1984, and that Respondents' were therefore not required under the law to recognize and bargain with the Union, is rejected.[26] I find, further, that the Respondents have violated and are violating Section 8(a)(1) and (5) of the Act by refusing since 25 January 1984, to recognize and bargain with the Union. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Aircraft Magnesium*, 265 NLRB 1344 (1982); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623 (C.A. 9 1983); *Metropolitan Teletronics Corp.*, 279 NLRB No. 134 (1986).

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[25] The fact that the number of engine models was reduced is not significant since the product remained exactly the same.

[26] Respondents also denied that the bargaining unit alleged in the Complaint is an appropriate unit. The District Court in Case No. 84-C-498 found that the unit sought by the Board there was an appropriate unit. At no time did Respondents introduce any evidence on this point, and what evidence there is, in the proposals made by U.S. Marine in the course of bargaining with the Union after April of 1984, shows that Respondent U.S. Marine, at any rate, did recognize the unit as alleged in the Complaint. I find in these instances that Respondents' Answers are not based upon real issues of fact or law, are frivolous and are designed to prolong and extend these proceedings. Those denials are, therefore, stricken from those Answers; See, e.g. *NLRB v. Boston Needham Industrial Cleaning Co., Inc.*, 526 F.2d 74 (C.A. 1, 1975) on the question of a split unit in a successorship situation, and are considered of no effect in this proceeding.

E. The Failure to Rehire

Closely tied to the factual issues which were discussed in the proceeding section is the issue raised by allegations in the Complaint that Respondents unlawfully failed and refused to rehire 34 former Chrysler employees who had applied for employment with U.S. Marine.[27]

Referring to my discussion in the previous section, it would seem that Hoag had intentionally and falsely manipulated the production, worker efficiency and attendance projections, and that he did not really believe either his own interpolations or the "manpower required" figures resulting therefrom. He would, in that case, have no compelling motive to decline to rehire any additional Chrysler employees. If, on the other hand, I were to believe that Hoag "doctored" these figures in the belief that the manpower totals resulting would be justified *post hoc* by the actual employment situation in June, then, and in that case, I could find that he declined to hire any more Chrysler employees after 31 January in order to avoid tipping the balance further toward a Union majority, and a legal obligation to bargain with the Union.

The major evidentiary fact tending to favor this latter alternative is the admitted failure of U.S. Marine to hire

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[27] There were actually 36 names on a list which was used as a reference at this hearing. One name, that of Donald C. Clark was stricken from the list since he died early in February, 1985. Another name, that of Marlene H. Shields was dropped by agreement of the parties since it was stipulated that she was not working at Chrysler as of 13 January 1984. Neither of these employees will be considered in my decision here.

any more Chrysler employees after 30 June, 1984. I received testimony from 12 of the former employees of Chrysler who were not hired. I refused to hear the remaining employees, informing the General Counsel at the hearing that I would infer, in the absence of evidence to the contrary, that all of the employees who were not hired were good employees, had exemplary work records, and were versatile and skilled in various jobs in the plant. Having heard nothing to the contrary, I find that the skills, abilities and versatility and other work-related characteristics of these 34 employees were comparable to those 223 former Chrysler employees who were hired by U.S. Marine.[28]

But beyond the bare fact that no former Chrysler employees were hired after 30 January 1984, even when that fact is considered together with the anti-union feelings and actions of the Respondents, as I found in the preceding and will find in the following sections of this decision, I can discern no real, substantive, evidence that

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[28] The record shows that the employment levels at Chrysler before it closed were far below what they had been. Local Union president Griffin testified that all the employees remaining in January 1984 had at least 10 years seniority. Thus, it is apparent that many of them had long service and were long in years as well. The length of service of the 12 former Chrysler employees who testified here ranged from 11 to 31 years. The average length of service was over 19 years. All of these people were middle aged, and some had histories of accidents, illnesses and allergies to industrial products. However, there is no evidence that either the employees who were hired, or those who were not and did not testify here displayed substantially different employment histories, health, seniority, or allergenic characteristics.

the refusal to hire the 34 was based upon their union membership or upon their former employment with Chrysler or even upon their various ailments, job preferences, or self-imposed restrictions on shifts or days they would be available for work.[29]

The hiring process which took place in the week of 16 January 1984, did not impress me as well-organized or systematic. The interviewers, a pick-up team of assorted Bayliner managers, might just as well have stayed at home, for all the effect their admittedly long and hard efforts had on the ultimate decisions on who would be hired. Aside from one instance where interviewer Gary Clement relayed to Hoag his opinion that applicant Timothy Noble had been drinking at the time of his interview[30] there is no indication that the notes they compiled

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[29] I am not unmindful, in reaching this conclusion, of the statements by Edson, memorialized by Richie, that Edson had no intention of dealing with the Union; nor of the establishment and maintenance by U.S. Marine of the Safety and Progress committees; nor of the statements and actions of Hoag and Lombardo during the extended negotiations with the Union from April of 1984 to the time of the hearing; nor of the impact of statements by these officers of Respondents on the collective bargaining process; but I cannot extrapolate from these other, demonstrated, unfair labor practices to those unfair practices alleged in this portion of the case, unless I can find a nexus, or a junction point, where Respondents' hostility toward the Union intersects with the hiring process here under discussion.

[30] Noble emphatically denied this while he was testifying. I credit Noble's denial. He was a candid and credible witness.

were used by Hoag in the final decisional process. Much more important to the process were the recommendations of Hackbarth, Bulgrin and Smith, former Chrysler managers, who rated the applicants and conveyed those recommendations to Hoag.

Hoag's own testimony on his part in the decisions to hire or not to hire tended to be fragmentary and not marked by his usual ability to remember past events. All of the notes that he received from the interviewers, and those notes he himself made either from the interviewers' notes or on the ratings from the Chrysler managers were destroyed after the original charges in Case No. 30-CA-8404 were dismissed by the Board's Regional Office.[31]

To sum up regarding the interview and hiring process, it is true that the methods used were informal and unscientific, and that we have very little in the record to document management's decision except Hoag's halting and anecdotal testimony, corroborated, if one can call it that, with halting and anecdotal testimony by the Bayliner interviewers and the Chrysler ex-managers. The end result of this process, flawed as it may have been, was the hiring as of 23 January, when the plant reopened, of 219 employees, all former Chrysler workers, including,

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[31] I can read not adverse inference into this action. Hoag did not act in an unreasonable or imprudent manner in assuming that when the Regional Office dismissed the case, it was dead and he could dispose of material dealing with it. Those of us who are more familiar with Board procedures might better appreciate the fact that, like Lazarus, cases can and do come back to life through appeals, or on reconsideration by the Regional Office or by the General Counsel.

according to Dan Griffin's testimony, of 16 out of the 17 former Union officers and stewards.

Turning to the next stage of the hiring process, the U.S. Marine manning level figures for January show that after the plant reopened on the 25th an additional 12 employees were hired on the 25th, of whom 3 were former Chrysler employees, 7 more on the 26th, including no former Chrysler employees, 18 on the 27th, with no Chrysler employees, 5 on the 30th, including the last Chrysler employee rehired, and 3 more on the 31st. This made a total of 264 including 223 Chrysler employees.

We do not really know, in spite of the size of this record and the diligence of all counsel in trying to make available to us all the material facts concerning the issues in dispute, what processes were used, or what standards applied, to these post January 23 hires as well as those in subsequent months. We have scattered pieces of information, such as employment records from Chrysler on six employees who were rehired, and showing poor or marginal performance ratings. These employment records were not, of course, available to U.S. Marine at any time, since Chrysler had removed all such records before the Respondents took over the Hartford plant. In any event, this information does not help the General Counsel, because it merely shows that some former Chrysler employees who did not have good work records were hired, and some of the 34 not hired, who were given low ratings by the Chrysler managers who continued to work for U.S. Marine, were not.

Similarly, the citations in this record of five persons who were not former Chrysler employees, and who were

hired, fails to give much support to the General Counsel's theory of disparate treatment accorded by Respondents to the 34 non-hires. Two of these people were obviously hired because of their relationship to U.S. Marine's personnel officer and production manager respectively. Another, a person with a Spanish surname, was hired according to Hoag to increase minority representation among the new employer's employees.

Beyond these two areas, and despite Personnel Manager John Lombardo's admission that some unqualified people who were not former Chrysler employees were hired, the General Counsel had failed to present what I consider substantial evidence that the failure to hire the 34 employees was due to the fact that they were members of the Union.[32] I cannot find, here, that the General Counsel has established that the 34 were not rehired because of disparate treatment. People with good and bad records were hired, or were not hired. The Respondents did hire 223 out of 257 former Chrysler employees who applied, including 17 out of 18 Union officers and stewards. There is no substantive evidence of why one person was hired and one was not hired. I do not believe that fairness, or principles of due process, or the principles of *Wright Line, a Division of Wright Line, Inc.*, 251

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[32] It seemed to be presumed by all parties, and I think I properly can infer, that all of the former Chrysler employees, having worked under a union shop contract, were members of the Union and would be counted by all parties as such. Hoag's general statements that there was disaffection with the Union among the rehired U.S. Marine employees were not supported by any evidence.

NLRB 1083 (1980), require that Respondents here be put to the test of carrying forward the burden of proving that their hiring process did not discriminate against the 34 alleged discriminatees.

In addition to these assertions of disparate treatment, the General Counsel also maintains that the failure to hire the 34 was due to an unlawful desire to keep the numbers of former Chrysler, i.e. Union, employees down below 50 percent of the figures U.S. Marine had computed as the total number of employees at the time of full employment in June, 1984. That latter figure, 460, made it imperative that the Respondents hire no more than 229 Chrysler employees, thus when the hiring of Chrysler employees reached 223, it was determined to hire no more. Under this theory the violation was a matter of numbers, not requiring proof of disparate treatment, and would apply equally to all those applicants not rehired because of Respondents numerical imperative, regardless of skills, versatility, flexibility or past employment record.

The problem I have with this theory is one which I discussed above, and also with the parties at the hearing, perhaps not as succinctly or articulately as I would have liked, but, basically, on the grounds that what we have here is an inherent contradiction between my findings that the "manpower required" figures computed by Jim Hoag early in 1984, and showing a total of 460 for June, were in fact false; and the General Counsel's theory that the manpower required figure of 460 was a real goal of the Respondents and that the failure to rehire additional employees was an unlawful attempt to attain a non-union majority of employees in June of 1984.

Since I have already found that the manpower figures computed by Hoag were false and designed to deceive the Board and the Courts on a theory that full employment at the 460 level would not be attained until June, I cannot now disavow these findings and can decide that the 460 figure was a real, valid goal and that the failure to hire was based on real and valid calculations that continued hiring of Chrysler employees would endanger a real, valid non-union majority. These two findings are incompatible and since I have made the first, I cannot now make the second. I find therefore that the General Counsel has not established a *prima facie* case that the failure to rehire the 34 former Chrysler employees violated Section 8(a)(1) and (3) of the Act. See *Wright Line, supra.*

F. The Collective Bargaining Negotiations

After the District Court's 10 May 1984 order to Respondent U.S. Marine to bargain, the Union and Company met for a total of 19 times between 24 May 1984 and 15 May 1985 in what were described in the record as bargaining sessions. The General Counsel has alleged Respondents' conduct in these sessions as further violations of Section 8(a)(1) and (5) of the Act.

In order properly to understand these allegations it is necessary to look at the totality of Respondents' conduct toward the collective bargaining process, as well as toward the Union, its officers and agents.

The attitude of the Respondent companies was made clear by Edson's statements to Richie described above. Edson, as the chief executive officer of Bayliner, had no

intention of dealing with the Union. Bayliner's employee and agent, Jim Hoag, emphasized this point at his meeting with the Union on 13 December 1983. Respondents' conduct through early 1984 reinforced these statements. They refused to recognize the Union, attempting to color their refusal with legality by the use of false and misleading employment projections.

On the takeover of the plant by U.S. Marine the five Union bulletin boards in the plant were removed. Griffin testified that this was done during the week of 23 January. Hoag did not really remember, but he "believed" it was someone in "Chrysler management" who removed the boards. I credit Griffin's version of this incident and find, consistently with my other findings herein, that the removal of the boards was done at Respondents' direction as part of a plan to wean the employees away from loyalty to the Union and into a position of dependence and reliance on Respondents. Another element in this overall scheme was the refusal by Hoag[33] to allow Griffin or any shop stewards any time off, either compensated or uncompensated, to investigate and process grievances. In this way, employees were left to whatever contacts they could make on breaks or outside of working hours, losing that moment when the incident was fresh in the minds of all and quick resolution was possible. Employees necessarily would become frustrated and the Union viewed as, at best, helpless, and at worst, ridiculous.

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[33] During all of the events of 1985, Hoag was the sole effective manager involved. By his own testimony, he was in constant communication on labor relations matters with Bayliner management in Arlington, Washington.

These measures show clearly that Respondents wished to eliminate any Union presence in the plant. This intention is also made clear in Hoag's insistence that bargaining meetings be held away from the plant and outside of working hours. When the City Hall in Hartford proved unsatisfactory, the meetings were moved 40 miles away to the Union's offices in North Milwaukee, far from any possibility of direct contact between the worker in the plant and the negotiation process.[34]

The principal element in Respondents' campaign to encourage employees to depend solely on management for the settlement of problems was the creation of what were called Safety and Progress Committees. These Committees were, according to Hoag's testimony, another Bayliner innovation which had been tried out at two of Bayliner's other plants, in Arlington, Washington and Valdosta, Georgia. The U.S. Marine employee handbook, which I have found was modelled on the Bayliner handbook, was issued to all U.S. Marine production workers as they reported to work on 23 January 1984.[35] The handbook, under the heading "Communication – Key to Understanding" goes on to describe the Safety and Progress Committee as follows:

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[34] I do not view this last as particularly important, but it is in line with those matters which are important and serves as a compatible and consistent link between Respondents' pre-bargaining conduct, and the negotiations themselves.

[35] The handbook had been distributed to office and supervisory employees in the week of 16 January, and applicants interviewed in that week were told about its contents by the Bayliner interviewers.

> "All employees will have the opportunity to serve as a representative from their work area on the Safety and Progress Committee. The committee meets on a regular basis to discuss in any open forum those ideas which will make your plant a better, safer and more enjoyable place in which to work.
>
> "In addition to employee representatives, senior management employees also attend the Safety and Progress Committee meetings. Information concerning U.S. Marine's goals and objectives are shared as well as progress toward meeting those goals and objectives. * * * ."

Hoag supplemented this by describing the Committee as a group of individuals who represent various people in the production areas of the plant, as well as the offices, and who meet regularly every 6 weeks to exchange information with management. There are 11 work areas in the plant, and each is represented by one employee appointed by the area supervisor. The employees are rotated in this representative function. The area representative meets with the other employees in his or her area and questions are propounded by the employees to the representative, who writes them all down. The representative's notes are then given to the area supervisor who may be able to handle some at his level. Those which can not be handled locally are sent up through management channels, and are typed and distributed to managers in different areas to answer. Then, 2 weeks after the original meeting between the area representatives and the employees in the 11 work areas, there is a meeting between the area representatives and "senior management." The questions originally asked by the area

employees, together with the answers prepared by management are distributed to the area representatives. Additional information on sales and other items considered by management to be of interest is given to the representatives. The meeting is then open to questions and discussions "on any part of our operation, including problem areas" employees feel cannot be discussed with their supervisor. All of these meetings, in the area as well as the plenary session are compulsory and are conducted on working time.

The subject matter of the meetings was shown by several sets of minutes[36] from February, April, May and July, 1984. These show that the meetings were used as a forum for pep talks by Jim Hoag on the Company's progress in selling outboard motors, and included questions and answer on safety matters, but also on matters such as wages, hours, breaks and lunch periods, subcontracting of maintenance work, profit sharing, hospitalization, rest rooms, rates of pay for day work, leaves of absence, and lunch schedules. Despite protestations to the contrary, such discussions continued after the District Court's order of 10 May 1984.

This Committee was organized by the employer and its structure, nature and functions were proscribed by the employer. Its meetings are conducted by supervisors.

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[36] The General Counsel wanted to place in evidence a number of additional sets of these minutes. I declined to receive them on the grounds that they would be cumulative. The General Counsel urges in his brief that I reconsider, but in view of my disposition of this issue, I will stand by my original ruling.

Area representatives and employees are paid for time spent in these meetings.

On these facts it is apparent that, as conceived, created, and maintained by the Respondents, the Safety and Progress Committee at U.S. Marine presents a classic example of an employer-dominated labor organization; *Wahlgren Magnetics*, 132 NLRB 1613, (1961). There is no allegation in this Complaint of a violation of Section 8(a)(2), but, on these facts, I find that the original and continuing recognition of the Safety and Progress Committee as a representative of its employees, constitutes an interference with the rights guaranteed employees by Section 7 of the Act; and concomitantly, a violation of Respondents' duty to bargain with the Union, all in violation of Section 8(a)(1) and (5) of the Act.[37] *Hunter Douglas, Inc.*, 277 NLRB No. 123 (1984).

Approaching the bargaining sessions themselves, I perceived from my observations of them as witnesses, that the Union negotiators, Griffin, Neff and Johnson were conservative in the sense that they wanted to retain the outline and language of the Chrysler contract, with which they were familiar. Beyond that, I found them to be flexible on most issues, but firm on fundamentals like union security, seniority and grievance procedures. My observations of the management negotiators, Hoag and personnel director John Lombardo, revealed two people

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[37] Respondents' conduct in continuing to recognize the Safety and Progress Committee and to deal with it on matters involving wages, hours and conditions of employment, seems to me at least disrespectful to the District Court's 10 May 1984 order to bargain with the Union, as well as to this agency.

with a quite different view of labor-management relations. I can sum up that attitude by describing it as consisting of roughly equal parts of arrogance, innocence and ignorance. Arrogance in Hoag's pronouncements to the employees at the Safety and Progress Committee meetings, and as expressed in his stilted and condescending answers to some of their questions; Innocence in the remarks of both Hoag and Lombardo decrying the stubbornness of the Union as not seeing as clearly as they that with the employees' cooperation, and the Company's good will, all would be well, happy and prosperous; Ignorant in that neither Hoag nor Lombardo had any experience in the collective bargaining process or in the negotiation of collective-bargaining agreements. Hoag talked sometimes during the negotiations here as if he had a smattering of labor law, or that he was being advised by people who had a smattering of labor law, but that smattering proved to be inaccurate. Lombardo had some very peculiar ideas about the principles of exclusive representation and the duty owed by employers to the exclusive representative of its employees. Nowhere is this combination of artlessness and self-justification more apparent than in a memorandum which Hoag prepared and circulated to Lombardo and Harvey Bulgrin,[38] just before the start of the negotiations.

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[38] Bulgrin, formerly Plant Manager for Chrysler and a holdover in that job for U.S. Marine for a short time participated to some extent in the negotiations, but Hoag testified that he did not discuss the Union proposals with Bulgrin. His name appeared as attending all but one of the sessions between May 24 and the end of September, 1984, but there is no indication that he did anything, said anything, or had anything to do with the establishment or implementation of Respondents' policy.

"AIWA NEGOTIATIONS 1984

"*Philosophy*: We will seriously consider any matter which affects the wages, hours or terms and conditions of employment of our hourly workers.

We are not interested in negotiating about matters which benefit the union as an institution or employees solely because of their positions in the union hierarchy.[39]

"*Current Position*: Our wages, benefits and terms and conditions of employment are contained within our employee handbook, insurance booklet, profit sharing booklet (soon to be available) and the description of our progression plan. We are satisfied that our employees are fairly compensated and provided with good benefits.

"*Table Manners*: We will employ them at all times in the negotiating process. We will deal with all issues raised on a rational basis, even if the issues appear irrational.

"*Perception*: Our employees and the NLRB should perceive our negotiating as bargaining in good faith. Neither group should be able to be convinced that our positions are unreasonable.

"*Goal*: To achieve an accord acceptable to both management and the bargaining unit employees in a reasonable length of time."

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[39] Typical of Hoag's answers in this case was his response to a question by the General Counsel as to whether this quoted paragraph referred to union security matters. "No" said Hoag, but added, "not necessarily."

This document shows in its first and last paragraphs, a predisposition, first, to avoid any negotiations about matters of union security[40] or questions about rights and privileges of union officers or stewards; second, to try to separate the Union as an institution from its membership. This last observation is borne out by the matters I have outlined above: the removal of the bulletin boards; the refusal to allow grievance investigations and processing by stewards; and the establishment and maintenance of the Safety and Progress Committee.

The second paragraph of this memorandum states clearly the fact that any variation from the documents cited there, the employee handbook, the Company's insurance plan, the Company's profit sharing plan and a progression plan would be a remote and improbable eventuality.

The note of self-justification which I commented on above is clear in this second paragraph and prominent in the next two paragraphs, approaching the questions of Company conduct at the bargaining table and the perceptions of the Board, with lordly condescension. Again in the fourth paragraph, it is apparent that Hoag is interested in the employees, not the Union.

Turning, at last, to the negotiations themselves, and taking into consideration all this substantial background, I find that Respondents came to the table with a set purpose of avoiding a long lasting relationship with this Union which the Federal Court had ordered them to sit down and negotiate with. Hoag's statement at the second

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[40] Hoag's equivocal denial notwithstanding.

meeting that the contract, if they negotiated one, might be only temporary, depending on the outcome of the court proceedings; Hoag's refusal to meet more than once a week, saying this was about the best he could do with the other responsibilities he had;[41] Hoag's statement at the 14 June meeting that U.S. Marine's employees did not need a Union, that they were supposed to have faith and trust in the Company; but Lombardo's statements concerning what he considered the anachronistic features of unions and the fact that Union issues were not the "hot issues" in 1984; all bespeak an attitude on the part of these managers which would make an agreement difficult.

The negotiations began, and ran from 24 May to at least 22 August, a total of seven meetings that were largely taken up with explanations by the Union negotiators of the Union's proposals. It is not uncommon in the field of collective bargaining for one of the parties to come to the bargaining table with a new negotiator, unfamiliar with the collective bargaining history and the informal relations between the parties. A certain "breaking in" is something to be expected. But in this situation

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[41] Neither U.S. Marine nor Bayliner is a mom and pop operation. They are both substantial corporations with substantial resources. The fact that the Union was forced to dance attendance on Hoag's convenience in lieu of dealing with a competent professional in the field of labor relations, indicates to me a rather cynical desire to hobble the collective bargaining process. The fact, as Hoag stated, that he did not even consult with Harvey Bulgrin, Chrysler's plant manager, concerning the Union's proposals, which were based upon the Chrysler contract, shows me that Hoag was not really serious about the bargaining process. Bulgrin apparently was fired by U.S. Marine in September or October, 1984.

both Hoag and Lombardo, obviously intelligent and competent people, but admitted amateurs both in the field of collective bargaining and in the informal relations between the Union and Chrysler, sought no advice from Bulgrin, who if he did not negotiate the Chrysler contracts, at least had something to do with their administration, or any other professional. Hoag and Lombardo in effect told the Union, "teach us about this contract you want us to agree to." This task, even with a trained educator on one side, and open-minded students on the other, would be formidable enough, but with working union representatives on one side, and Hoag and Lombardo, carrying the burdens of their prejudices, on the other, it is scarcely surprising that the Union's explanations of its proposals failed to prove persuasive.

A review of the minutes compiled by John Neff for the Union and John Lombardo for U.S. Marine shows that there was a lot of discussion over issues such as grievances, time off for stewards, and the 34 former Chrysler employees who were not hired, and less consistent and direct talk about the basic issues of wages and hours. There was what I would call a lack of "flow" in the negotiations. This "flow" or "current" describes the process of serious negotiations when both parties grasp an issue or series of issues and push them along, moving and conceding back and forth, until agreements are reached. There was none of this either in the testimony or in the notes submitted in evidence here.[42]

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[42] I would point out also that this "flow" process can move around and past tough issues, like union security or seniority

(Continued on following page)

The Union had submitted a proposed contract on 24 May 1984, and, as noted, the parties entered into lengthy discussions on the meaning of each article. The Company countered these proposals with the suggestion that the Company's employee handbook serve as the collective-bargaining agreement. It was not until the tenth session, on 22 August, that the Company submitted a partial proposal, consisting of eleven whole or partial articles, including recognition, non-discrimination, hours and overtime, vacations and holidays and a no-strike clause. The parties agreed at this meeting to delete Bayliner's name from the proposed agreement, and to the preamble of the agreement.

On 29 August, the parties agreed to a provision for non-discrimination contained in both the Company and Union proposals, and Hoag agreed to Union suggestions on the make-up of the Union and Company bargaining committees.

There were no agreements on 5 September, and on 12 September there was a tentative agreement on vacation schedules, but no agreement on other provisions of the vacation article as proposed by the Company. There was an agreement on a no-strike, no-lockout clause, as proposed by both parties. On 19 August, the Company

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(Continued from previous page)

in this case, then return to reconsider those issues. There was none of that in this case. Hoag felt that since the Union would not agree to Company demands on two issues the parties were at impasse, and there was "no sense" in meeting with a Federal Mediator.

agreed to a Union proposal for special Union-Company meetings, to some provision for jury duty pay, and a probationary period as proposed by the Company. On 11 October the parties finally agreed to a recognition clause with certain exceptions as proposed by the Company; and a provision for funeral leave. The 17 October meeting resulted in no progress toward solution of outstanding issues, and on 25 October there were no substantial agreements on any proposals. Hoag submitted a new set of proposals, which were rejected by the Union.

At this point the Union, through Johnson, suggested that the parties call in a federal mediator to help in working on a agreement. Hoag rejected this. He said that since the Union would not agree on two issues, seniority and union security, there was no sense in meeting with the mediator.

The Company's last proposal of 25 October was implemented on 21 January 1985. There were two additional bargaining sessions, on 10 April and 15 May 1985, when the Union proposed modifications on its seniority and union security proposals. These changes were rejected by the Company, and no further meetings had been held down to the time of this hearing.

In making my determination on the question of whether Respondents here engaged in hard but lawful and legitimate bargaining, or whether they merely went through the motions, not with any desire to make any accommodations or to come to agreement, I have examined these negotiations in the framework of Respondents' total conduct, beginning with the initial views of Edson and Hoag before the Respondents took over the plant

that they had no intention of recognizing or bargaining with the Union; the immediate removal of the bulletin boards, the shackling of the Union officers and stewards, and the establishment of the Safety and Progress Committee immediately on taking over in January 1984; the continual, illegal, activities of Respondents in using the Safety and Progress Committees to denigrate the Union and to serve as a bargaining and grievance forum bypassing the Union; the fabrication of false and misleading production and employment statistics to avoid Respondents' lawful obligations to bargain;[43] and the comments and statements disingenuously peppered throughout Lombardo's notes on the bargaining sessions that Jim Hoag said the employees did not need a Union, that he was never going to agree to union security, that the Company was not a "collection agency for Union dues," and that the Company would not agree to Union demands that would interfere with production.

I have noted Hoags manifesto on what the Company would not agree to, for "philosophical" reasons, and his satisfaction with the then current benefits provided in the employee handbook, and I note further that Hoag stood firm on his philosophy and on the Company's benefits throughout the entire negotiations, refusing even to consider union security, checkoff, seniority (except in a very

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[43] As a postscript to this element, I might also note the empty and unsupported claim that U.S. Marine and Bayliner are separate and independent employers, even though information on this fact was and is particularly and exclusively within the knowledge of the Respondents.

limited way), wages, holidays, vacations, and all other categories of employee benefits.

The record of what transpired at the bargaining sessions did not show any dedication by management to the collective bargaining process. Not only was there no "flow" or "current" to the negotiations, there were special manifestations of smugness and self-satisfaction expressed by Hoag and Lombardo which inevitably tended to disrupt the meeting into a welter of mutual charges and recriminations. Likewise the Company officials refused to give relevant information to the Union both before and during the negotiations. While this is discussed, *infra*, as a separate area of alleged violation of law, it is applicable in this context here as a part of the total picture of Respondents' conduct and attitude toward the bargaining process.

The same attitude prevailed in the Company's treatment of the Union in connection with holiday shutdowns of the plant. The Union was notified, but only at the same time as all other employees, and the Union's request to bargain about at least the Christmas shutdown, was summarily rejected. In Lombardo's view, the Union was in the same position as any other "outside" organization, and entitled to no more consideration. This is understandable only in view of Lombardo's fancy that a union may be an exclusive representative of employees for some things and not for others. The Company's cavalier rejection of the Federal Mediation and Conciliation Service's help in

resolving the problem is indicative that the Company did not want to solve the problem at all.[44]

In consideration of all these reasons, the totality of Respondents' conduct, together with its firm purpose, decided before any negotiations began, that union security would not be considered, and its determination, before negotiations began, that its substantive benefits were satisfactory and adequate for the employees; and its consistent adherence to these positions right down to the end, I find that Respondents have engaged in surface bargaining, with no real intention to reach an agreement with the Union, all in violations of Section 8(a)(1) and (5) of the Act.[45] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 13 (C.A. 1, 1983); *Chevron Chemical Co.*, 261 NLRB 44 (1982); *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872 (C.A. 11, 1984).

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[44] I note also that the Company's declaration of impasse, based, according to Hoag, on the fact that he did not believe that the Union would agree to the Union security and seniority provisions offered by Respondents, was premature, but in view of the totality of conduct here, any remedy for the former would merge in that I am recommending for the latter. In such a case, however, any changes unilaterally implemented were unlawful as well *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (C.A.5, 1960).

[45] In view of these findings I take no position on the question of whether Respondents' insistence on using an awkward and cumbersome Wisconsin statute in place of a customary arbitration clause; and their insistence contractually on limiting the right of the Union to discipline or fine its members constituted additional evidence of bad faith. Cf. *Bozzuto's, Inc.*, 277 NLRB No. 100 (1985).

G. Additional Complaint Allegations

It follows from the findings already made that the Respondents had a duty to bargain with the Union from and after January 23, 1984 and that by refusing to give information including names and addresses of all employees hired in the bargaining unit I have found to be appropriate, job titles and wages, together with copies of any handbooks or manuals describing employee benefits, Respondents have further violated Section 8(a)(1) and (5) of the Act. The information requested is obviously relevant to the Union's duty to act as bargaining representative for all employees in the unit. Respondents have offered no reason why preparation of this information is burdensome in any way.[46] *Whitin Machine Works*, 108 NLRB 1537 (1954); *Pfizer, Inc.*, 268 NLRB 916 (1984).

The Complaint listed several incidents of unilateral changes in terms and conditions of employment instituted by Respondents without providing notice to, or offering to bargain with the Union. These were layoffs of employees during the Thanksgiving and Christmas holiday weeks; granting a wage increase to employees effective 21 January 1985; and individual bargaining with employees since 5 November 1984 regarding which employees should work during the 1984 Christmas and Thanksgiving layoffs.

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[46] Hoag's cynical comment that the Union could obtain payroll information from employees themselves does not raise a question of Respondents' ability to make this information readily available.

All of the facts on these matters were admitted by Hoag and Lombardo. The wage increase was a part of the implementation of the Respondents' last offer made on 25 October 1984. But I have found that the whole of Respondents' conduct during the negotiations was a show and a pretense, entered into and continued from May to October, 1984 with no real intent to enter into any agreement. In these circumstances, Respondents are not free to walk away from their obligations to bargain in good faith by pleading an impasse in a process indelibly tainted by an extended and grievous course of conduct which I have found violative of the law. Thus, I find that the failure to bargain over the Christmas and Thanksgiving layoffs in 1984 and the wage increase in January 1985 and independent violations of Section 8(a)(1) and (5).[47]

A final allegation in the Complaint charges that on 10 November 1984, Lombardo told a employee named Richard Powers that if U.S. Marine even had to observe seniority in job transfers or layoffs, U.S. Marine would no longer operate the plant. Lombardo remembered the conversation with Powers, but denied making the threat that U.S. Marine would move if they had to observe seniority in layoffs and transfers. I found Lombardo to be a credible enough witness, albeit arrogant and naive in his

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[47] I leave to the compliance stage of these proceedings the question of further unilateral changes in wages hours and working conditions. The taint I have found in the bargaining process may well affect further actions of Respondents, even though I decline to reopen this hearing to receive additional evidence on these matters.

approach to unionism in general and this Union in particular. I therefore credit his denial that he made such a threat.

IV. The Remedy

Having found that the Respondents have violated Section 8(a)(1) and (5) of the Act, I shall recommend that they cease and desist therefrom, and that they take the following affirmative action designed to effectuate the policies of the Act. I will recommend that Respondents be required to bargain collectively in good faith with the Union over wages, hours and terms and conditions of employment for employees in the following bargaining unit: All full-time production and maintenance employees of the Hartford, Wisconsin, plant, except executives, office and clerical workers, salesmen, shop superintendents, supervisors, engineers, nurses, first-aid attendants, guards, temporary summer/seasonal employees, any employee in training for the foregoing, and all other employees having the right to hire and discharge. Such bargaining in good faith shall commence immediately on the request of the Union, and shall continue until an agreement is reached, or a legitimate impasse occurs. I will further recommend that Respondents cease and desist from making unilateral changes in wages, hours and working conditions, and that they shall be ordered to bargain collectively and in good faith over all changes in such wages, hours and working conditions which have been made and implemented by Respondents since Respondents began operations at the Hartford, Wisconsin, plant on 23 January 1984.

I shall recommend that Respondents immediately furnish the Union with the information heretofore requested, and also furnish information legitimately required for collective bargaining or grievance processing as requested by the Union in the future.

I shall recommend that Respondents immediately cease and desist from dealing with the organization known as the Safety and Progress Committee, that they hold no further meetings of that Committee, and that they cease and desist from paying employees to participate in any meetings of the Committee.

Because of the serious nature of the unfair labor practices here found, and the disregard shown by Respondents to the fundamental rights of their employees, I find it necessary to recommend the issuance of a broad order, requiring Respondents to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act, *Hickmott Foods*, 242 NLRB 1357 (1979). For the same reasons, I shall recommend in my Order herein a visitorial clause as requested by the General Counsel.

Conclusions of Law

1. Respondents U.S. Marine Corp. and Bayliner Marine Corporation are employers engaged in commerce, and are a single employer within the meaning of the Act.

2. The International Union, Allied Industrial Workers of America, AFL-CIO, and its Local Union 879 are labor organizations within the meaning of the Act.

3. All full time production and maintenance employees at the Hartford, Wisconsin plant, except executives, office and clerical workers, salesmen, shop superintendents, supervisors, engineers, nurses, first-aid attendants, guards, temporary summer/seasonal employees, any employee in training for the foregoing, and all other employees having the right to hire and discharge, is an appropriate unit for bargaining within the meaning of the Act.

4. Respondents have violated Section 8(a)(1) and (5) of the Act by refusing to recognize the Union, by refusing to give information to the Union, by bargaining in bad faith with the Union, and by unilaterally implementing changes in wages, hours and conditions of employment without bargaining in good faith with the Union, and by bargaining individually with employees.

5. Respondents have violated Section 8(a)(1) and (5) of the Act by establishing and bargaining with the Safety and Progress committee.

6. Respondents have not violated the Act in any other manner.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I make the following recommended.[48]

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[48] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings and conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondents U.S. Marine Corp. and Bayliner Marine Corporation, their officers, supervisors, successors, agents and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain in good faith with the Union as the collective bargaining representative of: all full time production and maintenance employees at the Hartford, Wisconsin plant, except executives, office and clerical workers, salesmen, shop superintendents, supervisors, engineers, nurses, first-aid attendants, guards, temporary summer/seasonal employees, any employee in training for the foregoing, and all other employees having the right to hire and discharge, is an appropriate unit for bargaining within the meaning of the Act.

(b) Refusing to give information to the Union which is reasonably related to the Union's function as collective bargaining representative and in furtherance of the Union's obligation to process grievances for employees.

(c) Unilaterally changing wages, hours and other conditions of employment without bargaining about these changes with the Union and bargaining with individual employees concerning such changes.

(d) Engaging in collective bargaining, soliciting and discussing employee grievances with and meeting with the Safety and Progress Committee, and paying employees for serving on such Committee.

(e) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Immediately recognize and bargain collectively with the Union as the exclusive collective bargaining representative of their Hartford, Wisconsin employees in the unit described above on all provisions for wages, hours or other conditions of employment unilaterally implemented by Respondents since 23 January 1984, and concerning the terms and conditions for a new collective bargaining agreement, and, if agreement is reached, embody such agreement in a written document.

(b) Furnish the Union with any and all information duly requested by it and reasonably related to its function as such collective bargaining representative.

(c) Post at their Hartford, Wisconsin, plant copies of the attached notice marked "Appendix."[49] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the

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[49] In the event the Board's order is enforce by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Thirtieth Region, in writing, within 20 days from the date of this Order what steps have been taken to comply herewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondents, their officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

Dated, Washington, D.C. 22 August 1986

George F. McInerny
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and abide by its provisions.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for mutual aid or protection

To choose not to engage in any of these protected concerted activities

WE WILL NOT refuse to recognize and bargain collectively with International Union Allied Industrial Workers of America, AFL-CIO, and its Local Union 879 in the following bargaining unit:

All full time production and maintenance employees at the Hartford, Wisconsin plant, except executives, office and clerical workers, salesmen, shop superintendents, supervisors, engineers, nurses, first-aid attendants, guards, temporary summer/seasonal employees, any employee in training for the foregoing, and all other employees having the right to hire and discharge.

WE WILL NOT bargain in bad faith with this Union.

WE WILL NOT refuse to give information to this Union which is reasonably related to collective bargaining or the processing of grievances.

WE WILL NOT establish, recognize, bargain with or solicit grievances from any Safety and Progress committee.

WE WILL NOT unilaterally change wages, hours or other conditions of employment for employees in the bargaining unit described above, nor will we bargain with individuals concerning these matters.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain with the Union concerning all changes in wages, hours, and working conditions we have instituted since 23 January 1984.

WE WILL upon request bargain in good faith with the Union over a collective bargaining agreement and if agreement is reached we will incorporate such agreement in a written document.

WE WILL furnish such information as has been or will be requested by the Union which is reasonably related to its function as collective bargaining representative for the employees in the unit described above.

U.S. MARINE CORPORATION AND
BAYLINER MARINE CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Henry S. Reuss Federal Plaza - Suite 1240, 310 W. Wisconsin Avenue, Milwaukee, Wisconsin 53203, Telephone 414-291-3866.

STATUTORY PROVISIONS INVOLVED

1. Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) and (5), provide in relevant part:

(a) **Unfair labor practices by Employer**

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

2. Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in relevant part:

(c) **Reduction of testimony to writing; findings and orders of the Board**

* * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this subchapter * * * .

FILED
JAN 22 1992
OFFICE OF THE CLERK

No. 91-1006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U. S. MARINE CORPORATION AND
BAYLINER MARINE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD AND
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS
OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL LOCAL 879, ALLIED INDUSTRIAL WORKERS OF AMERICA'S BRIEF IN OPPOSITION

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LIST OF PARTIES

In addition to the International Union, Allied Industrial Workers of America, AFL-CIO, which is listed in the caption, Local 879, Allied Industrial Workers of America, which is an affiliated local of the International Union, Allied Industrial Workers of America, AFL-CIO, was also a party to those proceedings had before the Court of Appeals.

The International Union, Allied Industrial Workers of America, AFL-CIO and its affiliated local, Local 879, Allied Industrial Workers of America, will hereinafter be referred to together as the "Union".

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IN THE

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RESPONDENT INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, AND ITS AFFILIATED LOCAL LOCAL 879, ALLIED INDUSTRIAL WORKERS OF AMERICA'S BRIEF IN OPPOSITION

The Respondent Union respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of U. S. Marine Corporation and Bayliner Marine Corporation (hereinafter referred to together as "U. S. Marine")[1] to review the judgment of the Seventh Circuit

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[1] U. S. Marine in its Rule 29.1 Statement has pointed out that at the present time Brunswick Corporation ("Brunswick") has acquired all the shares of U. S. Marine and Bayliner Marine. It should be noted that it was in the latter part of 1986 that Brunswick had acquired all the shares of Bayliner and U. S. Marine from the prior four common shareholders (App. 100a) and has exercised

reported at 944 F.2d 1305 (7th Cir. Sept. 25, 1991) (en banc).

COUNTER STATEMENT OF THE CASE

The petition of U. S. Marine tends to overlook or omit record evidence; how the National Labor Relations Board (Board) had analyzed that evidence; and the standard that was applied by the Court of Appeals in reviewing the Board's findings and conclusions relative to that record evidence.

What the record discloses is that on October 19, 1983, Orin Edson,[2] the then Chairman of Bayliner, had written Chrysler and asserted, ". . . Our entire goal is to purchase *an ongoing business* . . . Bayliner Marine Corporation or its assignee, would agree to purchase all the assets of the Chrysler Marine Corporation . . ." (GC 103).[3] (emphasis added)

On December 7, 1983, James W. Hoag, Bayliner's Vice-President for Administration and an attorney, reported to Hartford, Wisconsin and on behalf of U. S. Marine was responsible for the hiring of the employees to be employed at the Hartford plant after the sales/purchase agreement with Chrysler was consummated (ALJ at App., 101a-102a).

On December 13, 1983 Hoag along with Chrysler representatives, met with the Union's representatives and

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control over the plant located in Hartford, Wisconsin. In April 1991 it was announced by Brunswick that the decision to close the Hartford, Wisconsin plant had been made and it is undisputed that by no later than January 31, 1992 such plant will be totally closed and the few employees left will also be let go.

[2] Orin Edson was one of the only four shareholders who owned both Bayliner and U. S. Marine (App. 100a).

[3] The Union will refer to references from U. S. Marine's Petition as ("Employer's Pet. p. ——"); to the decision of the Administrative Law Judge as ("ALJ at App. ——"); to the decision of the Board as ("Board at App. ——"); to General Counsel's exhibits as "GC ——"); and to employer exhibits as (Emp. Exh. ——").

Hoag informed the Union's representatives that Bayliner did not intend to recognize the Union and that he was not interested in having a union represent the employees, and that he was too busy to deal with the Union at that time (ALJ at App. 114a).

On December 28, 1983, Hoag provided Chrysler with his sworn affidavit that Chrysler then presented to the U. S. District Court for the Eastern District of Wisconsin in the matter of *Local 879 AIW, et al. v. Chrysler Marine Corp., et al.*, Civil Action 83-C-1983 and wherein Hoag swore ". . . That Bayliner . . . (d/b/a U. S. Marine) . . . expects to have a representative complement of employees hired in early January of 1984 . . . He [Hoag] further believes that their [Chrysler employees] prior work experience will be advantageous in securing employment with Bayliner as it should reflect the qualification it seeks . . ." (GC Exh. 12).[4]

On January 13, 1984 Chrysler closed its doors (ALJ at App. 100a). At the time Chrysler closed the Hartford plant it had employed approximately 262 employees in the bargaining unit represented by the Union (ALJ at App. 110a).

Hoag established the procedures that were to be followed for the interviewing of those applicants who sought to be employed by U. S. Marine at the Hartford plant and it was Hoag that made the decisions as to who would be hired and who would not be hired (ALJ at App. 112a).

On January 23, 1984 U. S. Marine commenced production at the Hartford plant with 219 employees, all of

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[4] The Union had obtained a "Boy's Market" preliminary injunction pending the results of arbitration against Chrysler, but Chrysler obtained a stay within days from the Court of Appeals (App. 5a). *Also see Local 879, AIW v. Chrysler*, 819 F.2d 786, 787 (7th Cir. 1987). It wasn't until after the Court of Appeals decision in *Chrysler* in May 1987, over three years after U. S. Marine took over, that the former Chrysler employees received the fruits from the Union's success in the arbitration against Chrysler.

whom had been former Chrysler employes. (ALJ at App. 112a-113a).

On January 25, 1984 the Union requested U. S. Marine to recognize it and to provide the Union with certain information. When the Union received no response, it filed the ULP charges in 30-CA-8206 on February 2, 1984. (ALJ at App. 114a-115a).

U. S. Marine continued to hire employees after the Union filed the ULP charge but no further former Chrysler employees were hired (ALJ at App. 113a). There were 34 former Chrysler employees who had applied for employment, all of whom had between 10 years and 31 years of service with Chrysler (Board at App. 68a n.4) and who possessed the skills, abilities, and versatility and other work related characteristics comparable to those 223 former Chrysler employees who had been hired. None of the 34 former Chrysler employes not hired was ever given any reason by Hoag or anyone else as to why he or she had been rejected (ALJ at App. 127a and *see* Tr. 1298-1300).

On February 8, 1984, U. S. Marine wrote to Region 30 of the NLRB in response to the Union's ULP charge in Case No. 30-CA-8206 and then claimed, ". . . that the time to review the employment status to determine successorship is when a representative complement has been hired and not before . . ." (GC Exh. 66).[5]

On February 17, 1984 U. S. Marine again wrote to Region 30 of the NLRB and asserted, ". . . Based on production forecasts prepared in January, Employer expects that 460 production and maintenance workers will be employed in June 1984. This forecast was prepared on the basis of information from Employer's marketing and manufacturing departments . . .

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[5] In Hoag's earlier sworn affidavit provided to the district court in the *Chrysler* case Hoag had represented under oath "That Bayliner . . . (d/b/a U. S. Marine) . . . expects to have a representative complement of employees hired in early January of 1984 . . ." (GC Exh. 12).

"There are approximately 35 open applications from former Chrysler employees. It is very unlikely when the complement of 460 is reached a majority will have been former Chrysler employees . . . If the work force at the appropriate time *consists of a majority of former Chrysler employees*, then the question of successorship for recognition must be addressed . . ." (GC Exh. 43) (emphasis added).

On February 28, 1984, the General Counsel of the NLRB caused to be issued a complaint in 30-CA-8206 alleging that U. S. Marine was violating § 8(a)(5) and (1) by failing to recognize the Union. On March 2, 1984, U. S. Marine filed an answer denying that it had any obligation to recognize the Union and to begin to bargain collectively with the Union as the exclusive bargaining representative of the employees.

On April 13, 1984, the Board petitioned the U. S. District Court for the Eastern District of Wisconsin for interim relief as provided for under § 10(j) of the Act while the proceedings were pending before the administrative agency. Hoag in another affidavit dated April 27, 1984 (GC Exh. 43) and submitted to the district court in opposition to the Board's seeking interim relief under § 10(j), represented therein that U. S. Marine's employment projections evidenced that there would be 460 employees employed in June 1984.

Hoag did not disclose to the Board or to the District Court that U. S. Marine then had two employment projections in its possession prepared on February 15, 1984 and April 4, 1984 evidencing that the number of employees employed in June 1984 would not exceed 396 (GC Exh. 35 and 38; *also see* App. 9a n.6).

The employment projection prepared by Hoag sometime in January 1984 to show 460 was later found by the ALJ to have been, ". . . false and designed to deceive the Board and the Courts . . ." (ALJ at App. 133a) The Board affirmed such finding (Board at App. 64a-65a).

On May 10, 1984 the district court granted the Board's petition under § 10(j) and caused to be issued an injunction enjoining U. S. Marine from refusing to recognize the Union during the pendency of the administrative proceedings that were still to be had before the NLRB.

U. S. Marine did not take any appeal from the District Court's 10(j) injunction and pursuant to that injunction U. S. Marine began to meet with the Union.[6]

In response to the Union's request to know what reasons existed as to why U. S. Marine had not hired any of the 34 former Chrysler employees while continuing to hire other individuals Hoag informed the Union "that the hiring was done by Bayliner managers and staff who were totally unfamiliar with the history and personnel conflicts of the former Chrysler organization." (Emp. Exh. 24).[7]

Between January 23, 1984 and July 2, 1984, which is the date the Union filed the unfair labor practice charge alleging the 34 8(a)(3)'s, U. S. Marine had hired approximately 102 additional employees none of whom had been formerly employed by Chrysler (GC Exh. 41g).

On October 1, 1984 the Union filed an additional unfair labor practice charge wherein it alleged that U. S. Marine

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[6] James Hoag was U. S. Marine's principal representative in the bargaining meetings that were had as a result of the issuance of the § 10(j) injunction by the District Court. U. S. Marine did not withdraw its answer to the General Counsel's outstanding complaint and it continued to deny that it was a successor to Chrysler.

In addition, U. S. Marine continued to hold Safety and Progress Committee meetings whereby it continued to deal directly with the employees and for which it was found in contempt (App. 10a).

[7] Subsequently at the hearings had before the ALJ, Mr. Hoag testified that in fact he had met with three former Chrysler executives and had each of these three individuals rate all the former Chrysler employees on a scale of one to three. The ALJ found that "Hoag then considered all this information and made the decisions on those who would be hired, and those who would not, without further consultation with the interviewers, the former Chrysler officials, or anyone else . . ." (ALJ at App. 112a)

did not confer in good faith in an effort to reach any agreement.

The NLRB's General Counsel caused complaints to be issued relative to each of the two additional unfair labor practice charges the Union had filed in addition to the complaint issued in the original charge. On September 16, 1985, the hearings before the ALJ were opened involving all three complaints that had been issued and these hearings consumed some nine (9) days and 1,887 pages of transcript as well as over 150 total exhibits.

Notwithstanding that U. S. Marine's principal representative Mr. Hoag, an attorney, had earlier provided a sworn affidavit to the District Court wherein he had identified that it was ". . . Bayliner . . . (d/b/a U. S. Marine) [that] expects to have a representative complement of employees hired . . ." (GC 12), U. S. Marine nonetheless denied the allegation that Bayliner and U. S. Marine constituted a single employer. U. S. Marine also persisted in its denial that it had violated the Act by having failed to recognize the Union when the Union had first requested it to do so in January 1984 even though by September 16, 1985, U. S. Marine knew that the number of employees employed by it at the Hartford plant had never reached the 460 figure in June of 1984 that Hoag had falsely projected and that in fact the number of former Chrysler employees employed by it had always constituted a majority of U. S. Marine's work force (Board at App. 64a-65a).[8]

On August 22, 1986 the ALJ issued his decision and found, amongst other things, ". . . that the manpower figures computed by Hoag were false and designed to deceive the Board and the Courts on a theory that full em-

[8] U. S. Marine also even denied that the bargaining unit was appropriate and the ALJ later held, ". . . I find in these instances that Respondents' Answers are not based upon real issues of fact or law, are frivolous and are designed to prolong and extend these proceedings . . ." (ALJ at App. 125a n.26).

ployment at the 460 level would not be attained until June . . ." (ALJ at App. 133a); and that U. S. Marine had violated § 8(a)(5) and (1) in numerous respects (ALJ at App. 148a-151a).

The ALJ did not, however, conclude that U. S. Marine's failure to have hired the 34 former Chrysler employees violated § 8(a)(3) or (1) of the Act. (ALJ at App. 133a)

U. S. Marine filed exceptions to the ALJ's decision and in those exceptions it persisted in claiming that U. S. Marine and Bayliner were not a single employer, and it also excepted "to any remedy in light of the fact that no unfair labor practices were committed . . ."

Both the Union and General Counsel had taken exceptions to the ALJ's decision and each had also filed answering briefs to the exceptions taken by U. S. Marine, U. S. Marine, however, filed no answering brief to the exceptions taken by either the Union or General Counsel even though both the Union and General Counsel were seeking additional relief including a restoration of the status quo ante remedy (Board at App. 61a).

On April 17, 1989, the Board issued its decision and order and affirmed the ALJ's findings that the manpower figures concocted by Hoag had been false and designed to deceive the Board and the courts (Board at App. 64a-65a), and that U. S. Marine and Bayliner constituted a single employer (Board at App. 62a) and that U. S. Marine had violated § 8(a)(5) and (1) of the Act in the various ways as determined by the ALJ (Board at App. 62a).

In addition, however, the Board, contrary to the ALJ, concluded that U. S. Marine's failure to have hired the 34 former Chrysler employees did violate § 8(a)(3) and (1) of the Act because as the Board explained, ". . Once Hoag decided that 460 would be the false projection, it became imperative that he hire fewer than 231 former

Chrysler employees, or the 460 figure became meaningless as a defense to the Union's recognition claim. Thus, the sham inflation of the full-compliment projection and the decision to stop rehiring former Chrysler employees once their number had reached 223 are complementary aspects of *the same scheme sought to be carried out by* U. S. Marine . . ." (App. 66a; Board at App. 66a; emphasis added).

The Board's order required U. S. Marine, amongst other things, to offer employment to and make whole those 34 former Chrysler employees that had applied for employment, but had not been hired nor provided any reason by U. S. Marine as to why any of them had not been hired. (Board at App. 78a-79a)

In addition, the Board's order[9] required that U. S. Marine,

> 2. Take the following affirmative action necessary to effectuate the policies of the Act . . . (c) On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before the Respondent's take over from Chrysler Corporation of the Hartford, Wisconsin operations, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from January 23, 1984 until they regotiate in good faith with the Union to agreement or to impasse . . .

(Board at App. 77a).

U. S. Marine then petitioned the Seventh Circuit to review the Board's order only insofar as the Board's order

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[9] One member dissented to the restoration of the *status quo ante* remedy sua sponte on due process grounds namely that such remedy had not been alleged in the complaint (Board App. 80a-85a). U. S. Marine makes no claim that the Court of Appeals rejection of that due process argument was improper (*see* App. 39a-42a).

had held that U. S. Marine had violated § 8(a)(3) and (1) by failing to hire the 34 former Chrysler employees and insofar as the Board's remedial order required U. S. Marine to restore the status quo ante that had existed immediately prior to U. S. Marine's take over.[10]

U. S. Marine no longer challenged the ALJ's conclusions, as affirmed by the Board, that:

(1) U. S. Marine Crporation and Bayliner constituted a single employer,

(2) U. S. Marine was a successor employer to Chrysler,

(3) U. S. Marine violated section 8(a)(5) and (1) of the Act by

(a) refusing to recognize and furnish certain information to the Union,

(b) failing to bargain in good faith with the Union,

(c) unilaterally implementing changes in terms and conditions of employment,[11]

(d) bargaining individually with employees, and

(e) establishing and bargaining with an employer-dominated labor organization (the Safety and Progress Committee).

(App. 17a-18a).

Judge Ripple writing for the majority of the Seventh Circuit did observe, however, that in analyzing the Board's

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[10] The Union also petitioned the Seventh Circuit to review the Board's order insofar as the Board had failed to provide additional remedies requested by the Union. The Seventh Circuit denied the Union's petition (App. 43a-51a).

[11] The Unilateral changes referred to were those that U. S. Marine put into effect after it met with the Union but reached no bona fide impasse (ALJ App. 148a-150a).

order that "We also note that these uncontested violations 'do not disappear by not being mentioned in a brief. They remain, lending their aroma to the context in which the [remaining] issues are considered citation omitted] . . ." (App. 18a)

On September 25, 1991, the en banc Court of Appeals issued its decision enforcing in full the Board's order. The decision was unanimous that there was substantial evidence on the record as a whole to support the Board's conclusion that U. S. Marine's failure to have hired the 34 former Chrysler employees violated § 8(a)(3) and (1) of the Act (App. 28a-29a; 51a-52a).

As to the Board's remedial order that required U. S. Marine to restore the status quo ante (App. 77a) the vote was 6-5 to enforce the Board's order. The majority opinion by Judge Ripple held the Board's remedy in the circumstances of this particular case was within the Board's statutory authority under $10(c) because

> . . . The Board's order is designed to prevent U. S. Marine from taking advantage of its wrongdoing to the detriment of the employees. The Board presumes that, but for the unlawful practice, substantially all of the employees would have been retained and the employer would be obliged to consult with the Union before setting new terms. Because of this obligation to bargain with the Union, restoration of the previously existing employment terms, the *status quo ante*, is an appropriate remedy . . .

(App. 38a)

The dissenting opinion by Judge Easterbrook, was grounded on the premise that even a new owner that seeks by unlawful means, including unlawfully refusing to hire employees of the predecessor for no reason other than to evade acquiring the obligations of a "successor" under the Act nonetheless still retains the absolute right to establish whatever initial terms and conditions of employment that it chooses and the Board's order was not a remedy but was a penalty and should not be enforced. (App. 51a-52a)

REASONS FOR DENYING THE WRIT

U. S. Marine's petition for certiorari claims that the Seventh Circuit's judgment gives rise to two questions – that are both worthy of review by this Court.

The Union suggests that in regards to the alleged issue of "Whether the Board and the Court of Appeals misallocated the statutory burden of proof by ordering U. S. Marine to hire the remaining 34 former Chrysler workers . . ." (U. S. Marine Petition at i) that such "issue", regardless of how artfully phrased, does not justify this Court's review of what at its core, simply involves a question of weighing the evidence in the record to determine whether or not there was substantial evidence in the record as a whole to support the Board's conclusion that U.S. Marine's failure to have hired the 34 former Chrysler employees violated § 8(a)(3) and (1) of the Act.

The issue concerning whether the Board has the statutory authority under Section 10(c) to order any successor employer to ever restore the terms and conditions of the predecessor employer is of more substance, particularly in view of Judge Easterbrook's dissenting opinion. The Union nonetheless would in the circumstances of this particular case and in view of the current situation involving the closing of the Hartford plant, respectfully submit that U. S. Marine's petition should be denied in toto. The Seventh Circuit's judgment enforcing the Board's order, given the specific facts and circumstances that were found to exist does not create a conflict with the other circuits; and a restoration of the status quo ante is not a penalty but is a type of remedy that is available to the Board under § 10(c) of the Act.

The Union would emphasize that the Board's restoration of the status quo ante remedy in the context of a successorship case is inextricably interrelated with and arises from its finding that U. S. Marine had violated both § 8(a)(5) *and* (3). (App. 72a) The Court of Ap-

peals judgment enforcing the Board's order was likewise premised on the fact that U. S. Marine had violated § 8(a)(5) *and* (3). ["The remedy ordered in this case is based on the established principles applicable to successors who discriminate in order to avoid a bargaining obligation . . ."] (App. 40a)

I. AN EMPLOYER'S REFUSAL TO HIRE THE EMPLOYEES EMPLOYED BY THE PREDECESSOR AS PART OF A SCHEME TO EVADE ACQUIRING A BARGAINING OBLIGATION UNDER *BURNS* IS UNLAWFUL UNDER § 8(a)(3) OF THE ACT AND THE COURT OF APPEALS DECISION HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE ON THE RECORD TO SUPPORT THE BOARD'S CONCLUSION WAS PROPER.

In *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 262 n.8 (1974) this Court made clear that ". . . [A] new owner could not refuse to hire the employees of his predecessor solely because they were union members *or* to avoid having to recognize the union . . . . " (emphasis added) and citing *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 280-81, n.6.[12]

All eleven judges of the Seventh Circuit have agreed that both the Board's findings and conclusion relative to U. S. Marine's failure to hire the 34 former Chrysler em-

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[12] *Howard Johnson* involved a case arising under 301 LMRA where the union representing the employees of the predecessor employer had sought to require the new owner to arbitrate the issue of the new owner's failure to have hired the predecessor's employees. This Court noted ". . . There is no suggestion in this case that Howard Johnson in any way discriminated in its hiring against the former Grissom employees . . ." 417 U.S. at 262 n.8.

The question of whether a new owner has a legal duty to recognize the union that represented the predecessor employees as the successor to the predecessor employer appears to be one that should be resolved, in the event there is a dispute, under the NLRA and not under § 301 LMRA. *Cf. Laborers Trust Fund v. Advanced Concrete*, 484 U.S. 539, 544 n. 6 (1988).

ployees violated § 8(a)(3) and (1) was supported by substantial evidence on the record as a whole. (App. 19a-29a).

This Court has long recognized that "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). *Also see Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 172-173 (1973).

U. S. Marine doesn't argue that the court of appeals decision does not comport with the *Universal Camera* standard, but instead argues that this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) has made *Universal Camera* irrelevant.

This Court in *Transportation Management* upheld the Board's position regarding a dual motive type case where the Board had found that the employer had violated § 8(a)(3) and (1) by having discharged an *individual* employee because he had engaged in protected union activities. As the Court held, ". . . It is thus clear that the Board's finding that Santillo would not have been fired if the employer had not had an anti-union animus was 'supported by substantial evidence on the record considered as a whole' . . ." 462 U.S. at 405.[13]

Transportation Management did not involve the refusal to hire a number of the predecessor's employees by a new

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[13] U. S. Marine's reliance on *Halo-Krome Co. v. NLRB*, —— F.2d ——, 138 LRRM 2661 (1991) (Emp. Pet. 28-29) is wholly misplaced. In *Halo-Krome Co.* the Second Circuit did apply the same *Universal Camera* standard as did the Seventh Circuit. The Seventh Circuit after review of all the evidence concluded that the Board's inference that the 34 former Chrysler employees were not hired in ordr to evade a bargaining obligation was reasonable and supported by the substantial evidence (App. 28a).

owner not because of any of their own individual union activities but in order to simply permit the new owner to evade becoming a successor employer under the Act.

It was not necessary in the circumstances presented here for the General Counsel to show that it was the particular union activities of each of the 34 that caused Hoag to not hire each of them because it was U. S. Marine's seeking to evade a bargaining obligation as the successor to Chrysler that caused it to not hire the 34, *see Ballou Birch Co. v. NLRB*, 798 F.2d 339, 342 (8th Cir. 1986). *Also see Birch Run Welding and Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179-80 (8th Cir. 1985); *M.S.F. Industries Inc. v. NLRB*, 568 F.2d 166, 176 (10th Cir. 1977); *Majestic Molded Products Inc. v. NLRB*, 330 F.2d 603, 606 (2nd Cir. 1964).

U. S. Marine has failed to demonstrate any legitimate reason as to why this Court should grant its petition for certiorari on the issue of whether there was substantial evidence to support the Board's conclusion that U. S. Marine's failure to hire the 34 former Chrysler employees was to evade becoming a successor and the Union would respectfully request that this Court deny any review of that issue.

II. THE BOARD'S RESTORATION OF THE STATUS QUO ANTE REMEDY WAS NOT INCONSISTENT WITH "*BURNS*"; WAS NOT PUNITIVE; AND THE COURT OF APPEALS' DECISION ENFORCING THE BOARD'S REMEDIAL ORDER APPLIED THE PROPER STANDARD FOR REVIEW AND WAS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

It has to be borne in mind that conduct of the kind engaged in by Hoag on behalf of U. S. Marine doesn't simply exist in a vacuum or that U. S. Marine doesn't really intend to accrue benefits to itself by engaging in such conduct. U. S. Marine knew when it had Hoag embark on the scheme it did that "[I]n the labor field,

as in few others, time is crucially important in obtaining relief . . ." *NLRB v. C & C Plywood*, 385 U.S. 421, 430 (1967). U. S. Marine was also aware that by unlawfully withholding recognition this "disrupts the employees' morale, deters their organization activities, and discourages their membership in unions . . ." *Franks Bros. Co. v. NLRB*, 482 U.S. 27, 49-50 (1987), cited approvingly in *Fall River Dying & Finishing Corp. v. NLRB*, 482 U.S. 27, 49-50 (1987).

Fall River Dying is important in that it is a "successorship" case and therein this Court fleshed out what it had earlier held in *NLRB v. Burns Int'l Security Services Inc.*, 406 U.S. 272 (1972).

The Board here has grounded its authority to provide for a status quo ante remedy in a successorship situation from this Court's recognition in *Burns* that there may be exceptional situations where a new owner could be obligated to consult with the union over the initial terms and conditions of employment. *Burns*, 406 U.S. at 294-295 (*also see* App. 70a-71a).

Fall River Dying adhered to the view, earlier expressed in *Burns*, that there could exist "the exceptional situation . . . in which a successor should consult with the union before setting these [initial] terms and conditions, from the standard situation in which a successor could set its own terms free of the union's involvement . . ." 482 U.S. at 47 n.14.[14]

Judge Easterbrook's dissent, however, recognizes no such "exceptional situation" that would ever justify the Board's status quo ante remedy. According to Judge

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[14] In both *Burns* and *Fall River Dying*, the employer's in those cases did not unlawfully fail to hire the predecessor's employees in order to evade having to bargain with the union that had represented the predecessor's work force. Indeed, in *Fall River Dying* the employer there had continued to hire the predecessor's employees even after the union's premature recognition demand and it thereby acquired a bargaining obligation 482 U.S. at 52-54.

Easterbrook, the status quo ante remedy in a successor case would always constitute a penalty and a new owner must always have the absolute right to establish the initial terms and conditions.[15]

This Court has rejected arguments similar to those raised by U. S. Marine and as advanced in the dissenting opinion. No one doubts that employers have the right to subcontract work. However, where the employees are represented by a union if the employer *unilaterally* exercises that right to subcontract without first having afforded the union an opportunity to discuss such a decision, the employer will be deemed in substance for purposes of a remedy to have forfeited such right, *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 214-217 (1964).

This Court in *Fibreboard* rejected the argument that because the employer could "effect cost savings . . . by contracting the work out . . . [that] there is no need to attempt to achieve similar economies through negotiations . . . or to provide them [employees] with an opportunity to negotiate a mutually acceptable alternative." *Fibreboard Corp.*, 379 U.S. at 214. In rejecting such argument this Court's decision acknowledged, ". . . [A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations." *Ibid.*

Because a new owner has the power in substance to determine by its hiring policies whether or not it will become a "successor" under the *Burns/Howard Johnson/*

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[15] If the new owner retains the predecessor work force and initially retains the predecessor's terms and conditions but subsequently unilaterally changes those terms and conditions without having consulted with the union, such conduct would violate § 8(a)(5) and the Board's remedy would require the restoration of the status quo ante, *see Advanced Concrete supra*, 484 U.S. at 544 n.6. Therefore an "exceptional situation" under *Burns* must include a situation other than one that would already be covered by the Act.

Fall River Dying holdings, such a new owner when acting lawfully in regards to the hiring of employees retains the right to unilaterally establish the initial terms and conditions of employment; *see Spruce Up Corp.*, 209 NLRB 194 (1974), *enfc'd*, 529 F.2d 516 (4th Cir. 1975).[16]

Where the new owner is found to have implemented an unlawful hiring policy in order to evade fulfilling the legal duties of a successor then, according to the Board, that in essence presents an "exceptional situation, not a standard situation, where the new owner should consult with the union before setting the initial terms and conditions . . ." *Fall River Dying*, 482 U.S. at 47 n.14.

If a new owner is found to have brought itself by its conduct into "the exceptional situation" but hadn't consulted with the union before setting the initial terms and conditions then it is only through § 10(c) of the Act that the Board can restore that "exceptional situation" to what it should've been. Therefore an order such as provided by the Board in this case is one, ". . . which deprives an employer of advantages accruing from a particular method of subverting the Act, [and] is a permissible method of effectuating the statutory policy . . ." *Virginia Electric & P. Co. v. NLRB*, 319 U.S. 533, 540-541.

In *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) this Court held that a particular remedy that had been provided by the Board, i.e., requiring the employer there to agree to grant a check-off authorization, was not enforceable. However, that portion of the Board's order was deemed not enforceable, not because it was deemed to be

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[16] This Court took note of the Board's *Spruce Up* decision in *Fall River Dying*, 482 U.S. at 46 n.12 but only in regards to the fact that the Board had adopted the position that work force continuity for successorship cases was determined by whether a majority of the new owner's employees were those of the predecessor. Where a majority of the new owner's employees had been employed by the predecessor then the new owner according to the Board, is the successor and obligated to recognize the union.

a "penalty", but because this Court held that the Board's remedial authority under § 10(c) of the Act was limited by the same considerations that led Congress to enact § 8(d). 397 U.S. at 107.

U. S. Marine does not contend nor does the dissenting opinion argue that the considerations that led Congress to enact § 8(d) deprive the Board of the remedial authority in an "exceptional situation" arising in what might be described as a quintessential successor case [17] from ordering a new owner/successor to restore the terms and conditions of the predecessor where the new owner could be deemed to have had the obligation to discuss with the union the initial terms and conditions.

Judge Easterbrook asserted that "an obligation to 'consult' does not imply an obligation to use the old terms unless the union agrees to different ones . . ." (App. 54a). This court in *NLRB v. Katz*, 36 U.S. 736, 745 n.12 (1962), however, held that there is a substantial difference between the employer who engages in "consultation" first with the union and then acts, and the employer who unilaterally acts without consultation with the union. In the case of the former, the employer is free to act *after* consultation, but in the case of the latter, the employer commits an unfair labor practice and will be required as part of the remedy to restore the status quo ante, *see Fibreboard, supra.* In other words, a new owner's obliga-

[17] It is interesting to compare what occurred when the owners of U. S. Marine acquired the "assets" from Chrysler and how that impacted on the employees working at the Hartford plant with what occurred when the four owners of U. S. Marine's shares sold all the shares to Brunswick and how that impacted on the employees then working at the Hartford plant. In the latter case work went on just as before but in the former there was a one week shutdown and then work proceeded just as before except the employees were not permitted to be represented by the Union; 34 former Chrysler employees no longer were working and didn't know why the new owners had unilaterally established certain new terms and conditions for the employees working at the Hartford plant.

tion to discuss the initial terms before unilaterally establishing new terms and conditions does not mean that after having had discussed same with the union that it isn't thereafter free to unilaterally put into effect such changes even though the union might not agree.

The dissenting opinion also appears to reject the "uncertainty" principle (App. 59a). However, in law as in physics,[18] there is an "uncertainty" principle and that is used by courts as a matter of public policy and provides that "[T]he most elementary conception of justice and public policy requires that the wrongdoer shall bear the risk of uncertainty which his own wrongdoing has created . . ." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-265 (1946). *Also see Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Thorp Sales Corp. v. Gyuro Grading Co.*, 111 Wis.2d 432, 441 (1983).

To permit U. S. Marine to retain such advantages accruing to it from the particular methods it used to subvert the Act would be to in essence permit the wrongdoer to profit by its own fraud and wrongdoing and to encourage that which the Act forbids. It had been recognized that "[N]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrongdoing, or to found any claim upon his own inequity, . . ." *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889) cited approvingly in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, —— U.S. —— 60 U.S.L.W. 4029, 4033 (1991).

When wrongdoer employers are permitted to retain the profits from their own unlawful conduct to evade compliance with the NLRA, the ones then who are "penalized" are not only the employees of the employer, but also the employers who chose to observe the rule of law even though they may incur costs for them to do so.

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[18] *See* Paradigms Lost, John L. Casti pp. 450-453 for discussion of Werner Heisenberg's uncertainty principle as used in physics.

In *Food Handlers v. Valmac*, 528 F.2d 217-218 (8th Cir. 1975), the Eighth Circuit observed how the employer there ". . . fashioned this unbelievably strange situation out of what Shakespeare would call 'a quick sand of deceit' . . ." and that, ". . . Any reduction [in the remedy provided to the union by the arbitrator] would be inconsistent with the policy of the National Labor Relations Act because it would encourage the very conduct the Act sought to discourage—'bad faith' bargaining . . ." It also observed "Oh, what a tangled web we weave when first we practice to deceive [citing Scott, Marmion, Conto VI, st. 17] . . ."

The Union submits, and with all due respect to Judge Easterbrook, that if American industry and their representatives in order to survive have to deliberately engage in the unlawful conduct of the kind that Hoag engaged in on behalf of U.S. Marine in order to survive and compete against other employers that, then this country is truly in very serious trouble.

Lastly the Union would note that this case is already eight years old and the plant will be closed as of January 31, 1992. As far as any future bargaining obligation that might have been required under the Board's order, that question is now for all practical matters moot with the cessation of business at the Hartford, Wisconsin plant effective January 31, 1992 and with the few remaining employees all having been laid off.

In such circumstances and because the Seventh Circuit's decision is not at odds with the holdings of this Court or really create a conflict with the other Circuits, the Union believes that these practical reasons should be weighed in the calculus of this Court as to whether U.S. Marine's petition should be granted.

CONCLUSION

For all the foregoing reasons, the Respondent Unions respectfully submit that the Petition for a Writ of Certiorari should be denied in its entirety.

Dated this — day of January, 1992.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

U.S. MARINE CORPORATION and
BAYLINER MARINE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS
OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Amicus adopts the questions presented set forth in the Petition.*

* Although the Amicus believes that both questions presented raise important issues worthy of review by this Court, the focus of this brief will be on the rights of a successor employer to set its own initial terms and conditions of employment, which NAM believes to have been improperly infringed by the decision below.

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IN THE

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BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in a bal-

anced and proper interpretation of the principles of labor law that apply when the assets of one company are purchased to be used in the development of a new commercial enterprise.

NAM supports the Petition in this case because it presents an issue of substantial importance to NAM's members left open by this Court's decision in *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). The 6-5 decision below reflects a conflict among the circuits as to the right of a successor company to change its unionized predecessor's terms and conditions of employment, as long as such changes are annouced prior to the hiring of the predecessor's employees. The Seventh Circuit's enforcement of the order of the National Labor Relations Board here has the effect of retroactively abrogating the right of a successor employer to set its own terms of employment, a punitive result not contemplated by the National Labor Relations Act ("the Act"). Absent review and reversal by this Court, potential business investors will be deterred from providing needed capital to struggling enterprises due to the uncertainty over their ability to establish their own terms and conditions of employment.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH HOLDINGS OF OTHER CIRCUITS AS TO THE RIGHTS OF SUCCESSOR EMPLOYERS, A QUESTION OF SUBSTANTIAL IMPORTANCE.

In *NLRB v. Burns Int'l Security, Services, Inc.*, 406 U.S. 272 (1972), this Court held that a successor employer of a unionized facility was entitled unilaterally to change preexisting terms and conditions of employment without first bargaining with a union representing the predecessor's employers. The Court recognized that requiring any successor to adopt a predecessor's collective bargaining agreement, unless the successor chose to do so, would hamstring business purchasers generally by pro-

hibiting them from making changes needed to justify their capital investments.[1] The Court further held that, absent any preexisting relationship between the successor and the bargaining unit, there was no basis for imposing preexisting terms on the successor, under the settled principles of *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The *Burns* court did express the view that it would be "appropriate" for a successor to "consult" with a union in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit . . ." *Id.* at 294-95. However, in the years since *Burns* was decided, the National Labor Relations Board has interpreted the Court's holding to mean that a successor employer who intends to commence operations with a full complement of employees of its predecessor may still offer new terms and conditions of employment to those employees, so long as it does so prior to the employees' acceptance of the successor's employment. Thus, in *Spruce Up Corp. v. Fowler*, 209 NLRB 194 (1974), *enforced without opinion*, 529 F.2d 516 (4th Cir. 1975), the Board explained:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous workforce to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court.

The Second Circuit cited the *Spruce Up* decision with approval in *Brotherhood of Railways, etc. v. REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S.

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[1] As the Court stated: "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital . . ." 406 U.S. at 287-88.

1017 (1975), and reiterated that approval in both *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 881 (2d Cir. 1977) and *Saks & Co. v. NLRB*, 634 F.2d 681, 687 (2d Cir. 1980). The Ninth Circuit approved the Board's position in *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678 (9th Cir. 1980). Similarly, the D.C. Circuit approved the position in *International Association of Machinists v. NLRB*, 595 F.2d 664, 674-75 (D.C. Cir. 1978).[2]

The decision of the court below conflicts with this substantial body of precedent by permitting the Board to impose preexisting terms of employment on a successor employer notwithstanding the successor's timely announcement of new terms prior to any offers of employment. Specifically, under the Seventh Circuit's holding and that of the Board, a successor is being forced to adopt preexisting terms of employment as a remedy for alleged unfair labor practices in the hiring of its employees. This retroactive mandate is being imposed upon the successor in this case even though the new employer never misled anyone about its intentions to hire its workforce under new terms and conditions of employment, in full compliance with *Spruce Up Corp.* and the cases cited above.

The Seventh Circuit's decision also conflicts with the decision of the Ninth Circuit in *Kallmann v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981), which concluded that an identical Board "remedial" order against a successor who engaged in discriminatory hiring practices was

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[2] Indeed, the sole situation in which the courts have found a successor to have had "perfectly clear" intent to hire the preexisting workforce under preexisting conditions has arisen when the Board found that the successor "misled" the employees by "tacit inference" into believing that they would be retained without changes in their conditions of employment. *NLRB v. Backrodt Chevrolet Co.*, 515 F.2d 512 (7th Cir.) (unpublished order), *cert. denied*, 423 U.S. 927 (1975); *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841 (6th Cir. 1976); *cert. denied*, 429 U.S. 1040; *see also Spruce Up Corp., supra*, 209 NLRB at 195.

actually an unlawful penalty.[3] The Ninth Circuit denied enforcement of the Board's order, noting that "the function of the remedy in unfair labor cases is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Id.* at 1103. In the present case, on the other hand, the court below rejected the Ninth Circuit's analysis in favor of upholding an admittedly "imprecise remedy" fashioned by the Board. (App. 38a).[4]

Thus, a conflict clearly exists between the majority decision below and the holdings of other courts of appeals. The Petition should be granted so that his conflict can be resolved.

II. THE DECISION BELOW HAS ERRONEOUSLY APPLIED THE NATIONAL LABOR RELATIONS ACT TO THE CIRCUMSTANCES OF THIS CASE.

In addition to presenting a conflict with other circuits on the successorship issue, this Court should review the decision of the court below because the Seventh Circuit has reached a manifestly improper result which misapplies *Burns* and the Act. As its stated justification for imposing preexisting conditions on the successor employer in the present case, the court below held that the successor somehow forfeited its right to set initial terms or to rely on the Board's *Spruce Up* holding:

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[3] It is well settled that the National Labor Relations Act is a remedial statute only and that the Board is not permitted to levy punitive orders against labor law violators. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-01 (1984); *NLRB v. Strong*, 393 U.S. 357 (1969).

[4] The resulting conflict has been accurately described by the five dissenting justices in the decision below: "If, as four other Courts of Appeal hold, U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to hire, then these terms establish the bench mark that the Board is entitled to restore." (App. 56a).

> In *Spruce Up*, there was a *legitimate* ambiguity as to whether the new employer would in fact be able to hire the predecessor's employees because the new terms were substantially different from those of the predecessor. The employer did not refuse unlawfully to hire its predecessor's employees in order to avoid having to recognize and bargain with the union. By contrast, U.S. Marine, *by its illegal activity*, has created any ambiguity as to whether all or nearly all Chrysler employees would have accepted positions. That ambiguity must be resolved against it.

(App. 35a) (emphasis in original).

The court of appeals has failed to make clear, however, why the type of unfair labor practice allegedly committed here should have altered the obligation of a successor under the principles set forth in *Burns* and *Spruce Up*. In *Burns* itself, for example, the Board found that the successor committed unfair labor practices in its treatment of the predecessor's employees.[5] However, while acknowledging the unfair labor practices, the Court in *Burns* nevertheless reversed the Board's finding that the successor was bound to maintain the terms and conditions of the predecessor's collective bargaining agreement. 406 U.S. at 292.

Here, on the other hand, the court below relied completely on the illegal activities of the successor to justify its holding, without citing any connection between those activities and the successor's prior announcement of new

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[5] Burns supplied the predecessor's employees with membership cards in another union and informed them that they must become members of that union in order to work for Burns. The successor also indicated that the employees would not receive uniforms unless they signed the cards and that Burns could not live with the existing contract between the predecessor and the union. Burns then recognized the second union on the theory that it obtained a card majority. The Board subsequently found that the employer's actions towards its predecessor's employees violated the Act, a finding not disputed before this Court. 406 U.S. at 275-6.

terms and conditions of employment. Even assuming that the successor did discriminate against the predecessor's employees in the hiring process, its logical goal in doing so would have been to avoid "successorship" status and its attendant bargaining obligation. The Petitioner did not need to engage in discriminatory conduct in order to set its own starting terms for the bargaining process, because it could have done so even if it had hired *all* of its predecessor's employees.

Thus, if the Board's true purpose were to deprive the Petitioner of the "benefit" of its discriminatory activities (App. 32a-33a), then a bargaining order would certainly have been a sufficient and appropriate remedy, as the avoidance of bargaining was the only unlawful "benefit" which the successor conceivably could have hoped to achieve. Imposing the additional penalty of depriving the successor of its preexisting right to announce new terms from which to start the bargaining process, however, is nowhere justified in the decision below.[6]

It is clear that the Petitioner announced new terms and conditions of employment before it hired any employees, and those were the terms and conditions from which any negotiations with a collective bargaining agent would have begun, regardless of Petitioner's other conduct. Petitioner certainly did not "mislead any employees into believing that they would all be retained without change in their wages, hours or conditions of

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[6] The dissenting judges correctly analyzed the situation as follows:

> The Board found that U.S. Marine discriminated against 34 of the 257 applicants. The remedy for this sin is to hire the 34; it is not remedial to augment the offer to the other workers or to give these 34 terms better then they would have had if U.S. Marine had hired them in 1984. Had U.S. Marine hired these 34 (rather, had it evaluated their applications without discrimination), the terms afforded all workers still would have been those U.S. Marine set, not those Chrysler set.

(App. 57a).

employment" (*Spruce Up Corp., supra*, 209 NLRB at 195) thereby adopting the predecessor's collective bargaining agreement. Any unfair labor practices which were alleged occurred after the establishment of the new wages, hours and working conditions. Accordingly, the Petition should be granted so that the erroneous decision of the court below may be reversed.

III. ABSENT REVIEW BY THIS COURT, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON CAPITAL INVESTMENT IN FAILING COMPANIES.

As a consequence of the decision below, successor employers will have no way of knowing whether an announced intention to hire employees under new employment terms will be retroactively reversed in an unfair labor practice proceeding, at substantial cost. In addition, because of the conflict in the circuits with regard to the proper application of this Court's *Burns* decision, potential purchasers will lack the guidance necessary to make significant capital investments.

NAM believes that the five dissenters have accurately described the likely effects of the Seventh Circuit's decision to uphold the Board, absent review and reversal by this Court:

> [T]he Board's pretense of "remedy" has produced an order that may make profitable production impossible. By approving this masquerade we preserve featherbedding, increase the risks of taking over foundering firms, and frustrate the revival of aging plants. Neither American workers nor American consumers will welcome this consequence.

(App. 60a)

NAM strongly urges the Court to correct the mistaken views expressed in the decision below, in order to prevent an unwarranted, crippling effect on our nation's already troubled economy. The clear conflict in the circuits, the

erroneous nature of the Seventh Circuit's decision and the importance of the issue to industry as a whole all support the granting of the writ.

CONCLUSION

The decision of the Seventh Circuit is in direct conflict with four other Circuit Courts of Appeals. The question of the obligation of a successor either to adopt the terms and conditions of a predecessor's collective bargaining agreement or initiate its own new terms and conditions of employment must be resolved. The remedies applied by the NLRB and the Seventh Circuit must be considered a penalty, since the true reestablishment of the *status quo ante* under the conditions in this case would not require Petitioners, under the *Burns* doctrine, to adopt the terms and conditions of the predecessor's collective bargaining agreement. The Court should grant the Petition for Writ of Certiorari in order to clarify and insure proper application of the *Burns* doctrine.

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No. 91-1006

In the Supreme Court of the United States

OCTOBER TERM, 1991

U.S. MARINE CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, upon finding that a successor employer has unlawfully refused to hire 34 of the predecessor's employees in order to evade a bargaining obligation with the union, may order as a remedy the reinstatement of the predecessor's terms and conditions of employment until the successor bargains in good faith with the union to agreement or impasse.

2. Whether substantial evidence supports the Board's finding that the successor employer violated Section 8(a)(3) of the National Labor Relations Act by refusing to hire 34 of the predecessor's employees in order to evade a bargaining obligation with the union.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1006

U.S. MARINE CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, sitting en banc, Pet. App. 1a-60a, is reported at 944 F.2d 1305. The decision and order of the National Labor Relations Board, Pet. App. 61a-159a, which includes the decision of the administrative law judge, is reported at 293 N.L.R.B. 669.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case grows out of the acquisition by petitioner U.S. Marine Corp. of the Hartford, Wisconsin, manufacturing plant that was previously owned by Chrysler Marine Corporation (Chrysler), a subsidiary of Chrysler Corporation.[1] From 1965 until 1984, Chrysler used the Hartford plant to manufacture marine and industrial engines. During that time, the plant's production and maintenance employees were represented by the Allied Industrial Workers of America (Union). In 1983, Chrysler agreed to sell the plant to U.S. Marine. U.S. Marine assigned James Hoag to be general manager of the plant with responsibility for hiring employees. Pet. App. 3a-4a.

During negotiations for the sale of the Hartford plant, U.S. Marine stated to Chrysler that it would neither recognize the Union nor follow the terms of the existing collective bargaining agreement.[2] Instead, U.S. Marine intended to apply its own wage plan and working conditions to the employees, although it intended to encourage former Chrysler employees to apply and anticipated hiring at least 85% of them. U.S. Marine also said to Union representatives that it "had no intention of recognizing the union," "wanted no part of the [collective bargaining] contract," and was "too busy" to meet with the Union. Pet. App. 4a.

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[1] The transaction was negotiated between petitioner Bayliner Marine Corp. and Chrysler; U.S. Marine was then organized, with the same owners and officers as Bayliner, as the vehicle for acquiring the plant. Pet. App. 3a & n.2. In this opposition, we will refer to both petitioners as "U.S. Marine."

[2] The most recent collective bargaining agreement between the Union and Chrysler was in effect from July 1, 1983, to June 30, 1984. Pet. App. 4a n.3.

After the sale was consummated in January 1984, Chrysler laid off its former work force of 262 production and maintenance employees. Nearly all of them applied to U.S. Marine. U.S. Marine's accounting department concluded that the plant would need 396 employees by June. Because U.S. Marine desired to resume operations promptly, it reopened on January 23 with 219 employees, all of whom were former Chrysler employees. By January 25, U.S. Marine had hired 231 employees, 222 of whom were former Chrysler employees. By January 30, the last day on which U.S. Marine hired a former Chrysler employee, it had hired 261 production and maintenance employees, 223 of whom were former Chrysler employees. Pet. App. 6a-7a & n.4.

Thirty-four of the former Chrysler employees who had applied to U.S. Marine were not hired. Those employees were skilled and versatile in working in various jobs in the plant, had years of experience, and had work records comparable to the former Chrysler employees who were hired. U.S. Marine never informed those applicants why they were not hired, but continued to hire other employees, eventually attaining total employment of about 323 employees. Pet. App. 7a, 22a.

On January 25, two days after the plant reopened, the Union requested recognition. At that time, 222 of U.S. Marine's 231 employees were former Chrysler employees. U.S. Marine did not immediately respond to the Union's request. Several days later, however, James Hoag personally increased the projected complement of employees to be hired to 460 workers. This increase was purportedly required by greater production quotas for May and June, the basis for which Hoag was never able to explain, and by higher

assumed absentee rates, which reflected vacation allowances that the Chrysler employees (but not the U.S. Marine employees) would have had. Using the inflated projection, the number of former Chrysler employees that U.S. Marine had hired constituted less than a majority of the employees that U.S. Marine anticipated hiring. The increased projection therefore served to support a sham claim by U.S. Marine that it was not obligated to recognize the Union. Pet. App. 8a-9a, 14a, 23a-25a.[3]

2. By February 2, 1984, U.S. Marine had still failed to respond to the Union's request for recognition. The Union therefore filed an unfair labor practice charge with the Board, alleging that U.S. Marine had unlawfully refused to bargain with the Union, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1).[4] A complaint issued and the Board sought a temporary injunction in district court pur-

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[3] When a successor firm continues substantially the same business as its predecessor and when a majority of the staff hired by the new employer formerly worked for the predecessor, the successor has a duty to recognize and bargain with the union that represented those employees. *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 281 (1972); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 36-41 (1987). The successor's obligation to bargain is determined at the time that it has hired a "substantial and representative" complement of its anticipated workforce. *Fall River*, 482 U.S. at 47-52.

[4] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

suant to Section 10(j) of the Act, 29 U.S.C. 160(j), requiring U.S. Marine to fulfill its bargaining obligations. Pet. App. 9a.

U.S. Marine defended against the Section 10(j) action by denying that it had any obligation to recognize the Union; it asserted that, because its full complement of employees would consist of 460 workers, the former Chrysler employees would not constitute a majority of its work force. Rejecting that contention, the district court granted an injunction ordering U.S. Marine to recognize and bargain with the Union, and to furnish it with requested information. Pet. App. 9a-10a. Nevertheless, U.S. Marine continued to meet with a committee of employees to discuss working conditions without the Union, an action for which it was held in contempt of the injunction. See *Szabo* v. *U.S. Marine Corp.*, 819 F.2d 714 (7th Cir. 1987). U.S. Marine also frustrated negotiations with the Union by declaring, after about six months of negotiations, that the parties were at an impasse even though U.S. Marine had made only a single contract proposal to the Union, which the Union had rejected while requesting further talks. In January 1985, U.S. Marine unilaterally implemented the contract that the Union had rejected. Pet. App. 10a.

3. The administrative law judge (ALJ) determined that U.S. Marine had violated Section 8(a)(5) by refusing to recognize the Union, furnish it with information, and bargain in good faith; by unilaterally implementing changes in employment terms without good faith bargaining; and by bargaining with the employees without the Union. Pet. App. 11a, 153a. The ALJ rejected the charge that U.S. Marine had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discriminatorily refusing to hire 34

of the former Chrysler employees.[5] Pet. App. 11a-12a, 126a-133a.

The Board affirmed the ALJ's finding of a violation of Section 8(a)(5). Pet. App. 62a. The Board, however, also determined that U.S. Marine had violated Section 8(a)(3) in discriminatorily failing to hire the 34 Chrysler employees. The Board found that Hoag had falsely inflated the employment projections at U.S. Marine to 460 employees for the purpose of evading U.S. Marine's bargaining obligation,[6] and that it was "integral" to U.S. Marine's scheme to avoid its bargaining obligation that Hoag failed to hire the 34 Chrysler employees. Pet. App. 69a. The Board explained that U.S. Marine intended to rely on Hoag's falsified employment projection to justify a claim that its former Chrysler employees did not constitute a majority of its work force; if the 34 additional former employees had been hired, U.S. Marine would have been unable to sustain its claim

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[5] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). It is well settled that, although a new employer is not obligated to rehire the existing work force, the employer violates Section 8(a)(3) when it refuses to hire the former employees in order to avoid having to recognize the union that represented them. *Fall River*, 482 U.S. at 40-41; *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 n.8 (1974); *Burns*, 406 U.S. at 280 n.5.

[6] "For reasons fully supported by the record, the judge found that this 460 figure was false and misleading, and had been developed by Hoag shortly after January 31 to furnish a mathematical basis for a defense to the Union's bargaining claim." Pet. App. 64a.

under its sham estimate of the total work force.[7] The Board concluded that the General Counsel had established a "strong prima facie case" that the failure to hire the 34 employees was discriminatorily motivated, and that U.S. Marine failed to carry its burden to prove that it would not have hired those employees apart from its scheme to avoid bargaining with the Union.[8] Pet. App. 66a.

The Board then turned to the issue of remedy. Under *NLRB* v. *Burns Int'l Security Services, Inc.* 406 U.S. 272 (1972), the Board recognized that "a successor employer is ordinarily free to set initial employment terms, without preliminary bargaining with the incumbent union." Pet. App. 70a. But when " 'it is perfectly clear that the new employer plans to retain all of the employees in the unit,' the successor must consult the union before altering the terms and conditions of employment." *Id.* at 70a-71a, quoting *Burns*, 406 U.S. at 294-295. Because U.S. Marine had refused to hire the 34 employees based on its

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[7] "Hoag's fabrication of the 460 employment projection figure made it imperative that U.S. Marine hire no more than 230 Chrysler employees," Pet. App. 69a, and the remaining 34 Chrysler employees fell victim to that need, because U.S. Marine had already hired 223 former Chrysler employees. *Ibid.*

[8] "The record clearly establishes [U.S. Marine's] animus and discriminatory intent, which appeared even before [U.S. Marine] assumed the Chrysler operations and continued through the bargaining that followed as a result of the district court's injunction. * * * In addition, [U.S. Marine has] advanced no legitimate reasons for the refusal to hire the 34 former Chrysler employees. The record shows that all the employees who were not hired were good employees, had exemplary work records, and were versatile and skilled in various jobs in the plant." Pet. App. 67a-68a.

discriminatory motive to avoid a bargaining obligation, the Board concluded that "absent the[] unlawful purpose, [U.S Marine] would have retained substantially all of the predecessor's employees." Pet. App. 71a. Accordingly, the Board found that U.S. Marine was not entitled to set initial terms without first consulting the Union. *Id.* at 72a. As a remedy, the Board required U.S. Marine to restore the predecessor's terms and conditions of employment. *Id.* at 70a.[9] In so doing, the Board relied on the established principle that "in cases involving discriminatory conduct, the restoration of the status quo ante is a necessary remedy as it is the Board's policy that the wrongdoer, rather than the innocent victim, should bear the hardships of the unlawful action." *Id.* at 72a.[10]

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[9] Specifically, the Board ordered that U.S. Marine:

> On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before [U.S. Marine's] takeover from Chrysler * * * of the Hartford * * * operations, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from January 23, 1984, until [U.S. Marine] negotiate[s] in good faith with the Union to agreement or to impasse.

Pet. App. 77a. The order does not require, however, "rescission of any wage increase or other benefits that previously have been granted the unit employees." *Id.* at 70a n.6.

[10] The Board's order also required U.S. Marine to recognize and bargain with the Union; to offer immediate reinstatement to the discriminatees; to make employees whole for any losses suffered by reason of the discrimination; and to post a Board-prescribed notice at the plant describing U.S. Marine's obligations. Pet. App. 76a-79a.

4. The court of appeals, sitting en banc, enforced the Board's order. Because U.S. Marine did not contest that it had violated Section 8(a)(5) and (1) by failing to bargain, the court summarily enforced that aspect of the Board's order. Pet. App. 17a-18a. The court of appeals also unanimously enforced the Board's order that U.S. Marine had engaged in unlawful discrimination, in violation of Section 8(a)(3), in refusing to hire the 34 former Chrysler employees. Pet. App. 19a-29a.

On the issue of remedy, the court of appeals enforced the Board's order by a 6-5 vote. The majority concluded that the Board had properly ordered U.S. Marine to reinstate the conditions of employment in effect under Chrysler, "in order to restore the situation to what it would have been absent U.S. Marine's unlawful conduct." Pet. App. 33a. The court of appeals explained that "[b]ut for its unlawful conduct, U.S. Marine would have hired substantially all of Chrysler's employees and therefore would have been obligated to consult with the Union before setting the terms and conditions of employment." *Ibid.*, quoting *Burns*, 406 U.S. at 294-295. The court rejected U.S. Marine's arguments (1) that it was never "perfectly clear" that, absent discrimination, U.S. Marine would have hired the entire former Chrysler work force (Pet. App. 34a); (2) that, even if U.S. Marine had intended to hire the entire work force, it was nevertheless entitled unilaterally to impose its own terms under *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975) (Table) (Pet. App. 34a-35a);[11] (3) and that the Board's order was

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[11] In *Spruce Up*, the Board considered the situation in which the successor employer, before or at the same time as it offered

punitive rather than remedial (*id.* at 36a-39a).[12]

Judge Easterbrook, writing for the dissent, agreed with the majority that "[s]ubstantial evidence supports the Board's conclusion that U.S. Marine did what it thought expedient to evade its obligation to bargain collectively with its workers." Pet. App. 51a. He concluded, however, that the remedy in this case was punitive. Judge Easterbrook stated that because U.S. Marine would have been entitled to set its own initial terms even if it had avowedly set out to hire all of Chrysler's employees, the Board may not impose a remedy that denies U.S. Marine that right merely upon a finding that U.S. Marine had discriminated against certain employees to avoid incurring a later bargaining obligation. Pet. App. 52a-60a.[13]

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jobs to the predecessor's work force, announces that the offer is made on new terms. In that setting, the Board found, it is not "perfectly clear" that the successor will hire all of the prior work force (as some or all may refuse the new terms), and, accordingly, there is no duty to consult with the union before the employer sets those terms. 209 N.L.R.B. at 195. The court of appeals explained that *Spruce Up* is inapplicable here because U.S. Mairne had discriminatorily "refuse[d] unlawfully to hire its predecessor's employees in order to avoid having to recognize and bargain with the union." Pet. App. 35a.

[12] The court explained that it is well settled that the remedy for discrimination is restoration of the *status quo ante*; the difficulty in this case is in determining what the situation would have been had U.S. Marine not relied on a discriminatory scheme to avoid an obligation to bargain with the Union. That uncertainty should be resolved against U.S. Marine, since it was "the employer's conduct [that] has confused the situation." Pet. App. 38a-39a.

[13] The court of appeals and Justice Stevens denied petitioners' request for a stay pending the filing of a certiorari

ARGUMENT

1. Petitioners contend (Pet. 16-27) that the court of appeals' decision requiring U.S. Marine to restore Chrysler's terms and conditions of employment is inconsistent with this Court's decision in *Burns*, conflicts with the decision of other circuits, and represents an impediment to the takeover of failing businesses. Those contentions lack merit.

a. In *Burns*, this Court held that a successor is ordinarily free to establish its initial terms and conditions of employment without bargaining with the union. The rule reflects the fact that, in the usual case, it will not be known whether the new company will hire a majority of its employee complement from the predecessor's work force until the employees are actually retained. The Court indicated, however, that an exception to that rule may exist in cases when "it is perfectly clear that the new employer plans to retain all of the employees in the unit"; in that setting, it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-295; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 47 n.14 (1987).

The Court did not have occasion to explain in *Burns* the situations in which the "perfectly clear" exception would apply. Since then, the Board and the courts have sought to develop rules for applying the

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petition. See App. B to Application to Stay the Judgment Pending Certiorari, filed by petitioners in this Court, No. A-382 (denied Dec. 10, 1991) (Stevens, J., in chambers). The court of appeals stated that "after thorough en banc consideration, [the court] has determined that there is no division among the circuits on the issue appellants intend to present in their petition." *Id.* at 2.

Burns exception.[14] This case, however, does not involve the application of the *Burns* rule or its exception. Here, the Board faced the quite different issue of what *remedy* is appropriate when a successor has discriminatorily refused to hire employees in order to evade a bargaining obligation. That issue is distinct from the question of what rights a new employer would have in the absence of discriminatory refusals to hire in order to evade a bargaining obligation.

The courts of appeals have consistently upheld the Board's position that, when a firm has engaged in discrimination to avoid its successorship obligation, the Board may appropriately remedy that violation by requiring the successor to reinstate the predecessor's terms and conditions of employment. See Pet. App. 31a-34a; *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-307 (3d Cir. 1990); *American Press, Inc.* v. *NLRB*, 833 F.2d 621, 624-625 (6th Cir. 1987); *Kallmann* v. *NLRB*, 640 F.2d 1094, 1102-1103 (9th Cir. 1981).[15] The purpose of such a remedy is not a punitive one, but is to restore the situation, to the extent possible, to the one that would have prevailed but for the violation. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

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[14] For example, the Board's *Spruce Up* rule (see note 11, *supra*) reflects one aspect of the Board's interpretation of the *Burns* exception. That rule, however, does not address the situation presented here, involving discriminatory refusals to hire.

[15] In *Kallmann*, the court agreed with the Board that "the employer should not be permitted to benefit from his illegal conduct" and therefore may be required retroactively to apply the predecessor's terms. It disagreed only with the "extent" of the remedy ordered in that case. 640 F.2d at 1103 (holding that the prior terms should not apply "beyond a period allowing for a reasonable time of bargaining"). Petitioners have never made such a claim in this case.

When an employer has sought to circumvent bargaining by discriminatorily refusing to hire the former company's employees, the employer has made it impossible to determine precisely what terms and conditions would have been established had the employer bargained with the union. The Board's response to the discrimination is to restore, as the *status quo ante*, the predecessor's terms and conditions in order to set a base line for the award of back pay and other make-whole relief, and to enable the future bargaining to occur under conditions which approximate those that would have existed had there been no discrimination and the old work force, through its union, had commenced negotiations with the employer. While the Board's make-whole remedy must estimate the situation that would have occurred without unlawful conduct, "any uncertainty about what [the new employer] would have done absent its unlawful purpose must be resolved against [it], because it cannot be permitted to benefit from its unlawful conduct." *American Press, Inc.*, 280 N.L.R.B. 937, 938 (1986), enforced, 833 F.2d 621 (6th Cir. 1987).

The dissenting opinion in the court of appeals acknowledged that "the Board could resolve against U.S. Marine all factual ambiguities created by its illegal conduct." Pet. App. 55a. The dissent simply believed that, on the facts of this case, it was clear that U.S. Marine's employees would not have been offered Chrysler's terms of employment even if U.S. Marine had acted lawfully and had not discriminated against former Chrysler employees. The Board, however, made no such finding, nor is there evidence in the record that would compel such a finding.[16] Cf.

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[16] Judge Easterbrook claimed that, even if U.S. Marine had not discriminated, the initial terms of employment "still would have been those U.S. Marine set, not those Chrysler set"; and

INS v. *Zacarias*, No. 90-1342 (Jan. 22, 1992), slip. op. 3, 6 (substantial evidence inquiry means that an agency decision cannot be set aside unless the evidence is "so compelling that no reasonable factfinder could fail to find" facts other than those found by the agency). In light of the Board's broad discretion to draw inferences from the record and to fashion remedies for unfair labor practices, there is no basis for overturning its general approach in this class of cases. See *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943) (fashioning of remedies is "for the Board not the courts to determine" and Board's order must stand unless it represents "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act"); *Shepard* v. *NLRB*, 459 U.S. 344, 349 (1983); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).[17]

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even with bargaining, "[i]t is unimaginable that U.S. Marine would have agreed to use [Chrysler's] terms." Pet. App. 58a. The Board, however, had to select *some* terms of employment to apply in framing a retrospective remedy, and it was not required to speculate that, even if U.S. Marine had recognized its bargaining obligation, it would have set the same initial terms for the former Chrysler employees as it did in reliance on its discriminatory scheme. Nor was the Board required to invent a hypothetical set of compromise terms that would have been adopted if U.S. Marine had not violated the law. Instead, the Board reasonably resolved the uncertainty against the employer in order "to prevent U.S. Marine from taking advantage of its wrongdoing to the detriment of the employees." *Id.* at 38a.

[17] Judge Easterbrook thought that the Board's statement that U.S. Marine had "forfeited any right [it] may have had as a successor to impose initial terms," Pet. App. 72a, revealed that the Board's make-whole order was actually a "penalty," rather than a "remedy." *Id.* at 57a. The Board's statement,

b. The cases cited by petitioners (Pet. 18-26) do not conflict with the Board's approach in discrimination cases because petitioners' cases do not involve employers who engaged in discrimination in order to evade a duty to recognize the union. For example, in *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 881 (2d Cir. 1977), the Board found an unlawful failure to bargain under Section 8(a)(5). The court of appeals determined that, because the successor in that case had never "promised re-employment on the existing terms," there was no duty to bargain over initial terms; the court accordingly found that the employer had not violated Section 8(a)(5) in unilaterally imposing initial terms of employment. Unlike petitioners, however, the employer in *Nazareth* had not set initial terms while simultaneously engaging in a discriminatory scheme designed to evade recognition of the union, and was not subject to a remedy for that violation of Section 8(a)(3). *Nazareth*, therefore, did not address the issue presented here.[18]

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however, simply meant that since U.S. Marine's unlawful conduct had made it impossible to determine what terms would have been offered to the Chryler employees if U.S. Marine had not practiced an illegal scheme to avoid a bargaining obligation with the Union, it was necessary to return to the *status quo ante* and send the parties to the bargaining table. This is the way the majority understood the Board's approach. *Id.* at 38a ("[R]estoration of the previously existing employment terms, the *status quo ante*, is an appropriate remedy," although "imprecise because it must estimate to some degree the situation that would have occurred if there had been no discrimination. * * * A return to the *status quo ante* at least allows the bargaining process to get underway.").

[18] Petitioners misleadingly suggest (Pet. 23 n.9) that *Nazareth* involved a claim of discrimination which makes it similar to this case. In *Nazareth*, the court of appeals *rejected*

The same is true of the Second Circuit's later decision in *Saks & Co.* v. *NLRB*, 634 F.2d 681, 687 (1980). That case refined the court's analysis of when the *Burns* "perfectly clear" exception can apply, but, as the court of appeals in this case noted, in *Saks*, as in *Nazareth*, the Board did not "find that the employer had discriminated against former employees because of their union membership." Pet. App. 35a-37a n.22.

In *NLRB* v. *Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975) (Table), and *International Ass'n of Machinists* v. *NLRB*, 595 F.2d 664, 672-676 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979), the courts upheld the Board's conclusion that the successor firms, having offered jobs to the old company's employees while indicating that terms of employment would be different, were not required to bargain over those initial terms and had acted lawfully in not doing so. Obviously, those cases did not require the Board to formulate a remedy for discriminatory refusals to hire. In sum, the courts that have considered the Board's remedial approach in discrimination cases have unanimously upheld it; the cases cited by petitioners did not address the issue.

c. Petitioners' claim (Pet. 24-27) that the Board's approach in this case will inhibit business transfers is unfounded. Contrary to petitioners' contention

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as "time-barred" a discrimination claim involving only a single employee, who was refused employment because of his union activity, and not, as here, to affect the union's majority status. 549 F.2d at 882. Moreover, the discrimination finding in *Nazareth* had not been the basis for the Board's remedy. Here, in contrast, the court of appeals unanimously *upheld* the finding of unlawful discrimination to avoid bargaining, and it was that finding that served as the linchpin for the Board's remedial order.

(Pet. 26), the Board's approach does not ignore the great "public benefit in preserving the successor's ability to make immediate operating changes," *NLRB* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963, 973 (7th Cir. 1972) (Stevens, J., dissenting), vacated, 411 U.S. 912 (1973), or unduly burden the process of reviving a failing business. A new employer is free to offer its new employees such initial terms as it chooses and to hire whomever it chooses, so long as its hiring decisions are not motivated by antiunion considerations. Only where, as here, the employer unlawfully discriminates against its predecessor's employees does the remedy at issue in this case apply. The holding below does not imperil lawful business transfers; it simply addresses the unique remedial problems raised when an employer, such as U.S. Marine, embarks on a calculated scheme to evade bargaining through discrminatory refusals to hire.

d. Finally, review is not warranted because petitioners' remedial claim is jurisdictionally barred. Although petitioners raised that claim in the court of appeals, petitioners never raised it before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioners have shown no "extraordinary circumstances" here.

While the Board's remedy in this case granted relief that had not been ordered by the ALJ, petitioners never filed a motion for reconsideration to challenge the Board's decision. That failure constitutes a jurisdictional bar to their current claim. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 454 U.S. 645, 665-666 (1982) (finding court of appeals to be "without

jurisdiction" to consider an issue not raised before the Board by the filing of a "petition for reconsideration" or otherwise); *International Ladies' Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (Section 10(e) barred company's challenge because the company had "failed to file a petition for reconsideration" after the Board rendered an unexpected decision).[19]

2. Petitioners contend (Pet. 27-30) that the court of appeals erred in upholding the Board's finding that U.S. Marine engaged in unlawful discrimination. Specifically, they argue that the Board improperly placed the burden on U.S. Marine to show a "convincing rationale" for failing to hire 34 of the former Chrysler employees. That contention, which the court of appeals unanimously rejected, misconceives the burden of proof allocation approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), and ignores the substantial evidence that supports the Board's finding of unlawful discrimination.

In *Transportation Management*, the Court held that, under the Act, the General Counsel of the Board bears the burden of proving by a preponderance of the credible evidence that an employee's union membership or activity was a substantial or motivating

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[19] The court of appeals held that Section 10(e) did not apply here because the remedy issue was presented to the Board by the Board's General Counsel and the Union and because there was no danger of repetitious appeals. Pet. App. 30a n.17. The court of appeals' functional approach to waiving the strict jurisdictional requirement of Section 10(e) conflicts with the mandatory language of the statute and with this Court's unyielding enforcement of it. See *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979).

factor in the employer's adverse employment decision. After the General Counsel has made such a showing, however, the employer can avoid liability by showing it would have taken the same action regardless of the forbidden motivation. 462 U.S. at 401. The court of appeals correctly concluded that "[t]here is substantial evidence, both direct and circumstantial, from which the Board could infer that thirty-four of the applicants were not hired because they were union members who formerly had worked for Chrysler." Pet. App. 23a.

The record shows that U.S. Marine told both the Union and Chrysler, before finalizing the sale, that it had no intention of dealing with the Union. It further shows that U.S. Marine falsely inflated the work force figures in order to obtain a basis for claiming that the 223 Chrysler employees already hired did not constitute a majority (and thus there was no obligation to bargain with the Union). The record also shows that, under the falsely inflated work force projection, it was necessary for U.S. Marine to avoid hiring the 34 employees to prevent a bargaining obligation from accruing under the false projection.[20] Finally, U.S. Marine failed to advance any legitimate reasons for its refusal to hire the additional 34 Chrysler employees, who were good employees, were versatile and skilled in various jobs at the plant, had worked at the plant a minimum of ten years, and had work-related characteristics com-

[20] As the Board explained, petitioners' "fabrication of the 460 employment projection figure made it imperative that U.S. Marine hire no more than 230 Chrysler employees"; if the 34 discriminatees had been hired, petitioners would have overshot the majority mark. Pet. App. 69a.

parable to the 223 Chrysler employees who were hired.[21]

There is no merit to petitioners' contention (Pet. 28) that the Board improperly shifted the burden of proof by considering the inadequacy of U.S. Marine's reasons for failing to hire the 34 Chrysler employees "as an element of the General Counsel's *prima facie* case of antiunion discrimination." Nothing in *Transportation Management* supports the view that unlawful motivation must be established solely by independent evidence before the weakness of the employer's explanation can be considered. Indeed, in its *Wright Line* decision, 251 N.L.R.B. 1083 (1980), which enunciated the burden-shifting analysis approved in *Transportation Management*, the Board specifically noted that "[t]he absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case." *Id.* at 1089 n.12, citing *Shattuck Denn Mining Company* v. *NLRB*, 362 F.2d 466 (9th Cir. 1966).

Petitioner's reliance (Pet. 28-29) on *Holo-Krome Co.* v. *NLRB*, 947 F.2d 588 (2d Cir. 1991), is unavailing. The panel decision did state that the Board improperly "considered the weakness of rebuttal evidence * * * to find that the General Counsel established a *prima facie* case." *Id.* at 592. On the Board's petition for rehearing, however, the panel

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[21] Relying on the ALJ's statement that there is "no substantive evidence of why one person was hired and one was not," petitioners suggest (Pet. 27-28) that there can be no determination that U.S. Marine discriminated against the 34 applicants because they were union members who formerly worked for Chrysler. As the court of appeals explained, however, U.S. Marine's "unlawful scheme to avoid a bargaining obligation was furthered by the refusal to hire some of the former Chrysler employees, not by the refusal to hire those specific applicants." Pet. App. 23a n.11.

issued a supplementary opinion recognizing that "[t]o the extent that our opinion faulted the Board for considering the employer's explanation in the assessment of the *prima facie* case, it was thus a shade too broad." *Holo-Krome Co.* v. *NLRB*, Nos. 91-4061, 91-4085 (2d Cir. Jan. 17, 1992), slip op. 14.[22] After an extensive review of the Board's allocation of the burden of proof in discrimination cases, the court of appeals explained that:

> The Board wants the ALJ to make an initial determination as to whether the General Counsel has proved that protected activity was part of the motivation of the employer's conduct. In making that determination, the ALJ may use all of the record evidence. This clearly includes whatever explanation the employer gave to the employees during the episode, and, it apparently also includes the explanation that the employer presented at the hearing. Where the Board draws the line, however, is in the consideration of the employer's affirmative defense [that it would have taken the same action without regard to the improper motive]. That defense is not to be considered until the ALJ has determined that the General Counsel has presented a *prima facie* case. Thus, the employer's explanation *for the action it took* can be assessed in determining whether a *prima facie* case has been shown, but the employer's affirmative defense as to *the action it would have taken if no improper motivation had existed* cannot be assessed until the *prima facie* case has been proven.

Slip op. 10. The court of appeals then disavowed any suggestion that the Board errs when it considers "the

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[22] We have lodged copies of the opinion on rehearing in *Holo-Krome* with the Clerk of this Court.

employer's explanation as elicited by the General Counsel" in determining whether the employer was motivated by an anti-union purpose. The court also made clear that "if the employer elects to offer evidence rebutting the General Counsel's *prima facie* case (whether or not framed as an affirmative defense), the ALJ is entitled to assess the entire record in determining whether the *prima facie* case remains proven." *Id.* at 11-12.[23] In light of the clarifying opinion in *Holo-Krome*, it is readily apparent that there is no conflict in the circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[23] The factfinder's consideration of the entire record, including the employer's explanation when offered, is the normal procedure in resolving claims of unlawful discrimination. See *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983); *Hernandez* v. *New York*, 111 S. Ct. 1859, 1866 (1991) (plurality opinion).

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No. 91-1006

In The

Supreme Court of the United States

October Term, 1991

U.S. MARINE CORPORATION and
BAYLINER MARINE CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION, ALLIED INDUSTRIAL
WORKERS OF AMERICA, AFL-CIO,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

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REPLY BRIEF FOR THE PETITIONERS

I. As Judge Easterbrook forcefully pointed out in his dissent on behalf of five of the eleven circuit judges, the court of appeals' decision requiring U.S. Marine to reinstitute the terms and conditions of employment that were in effect under Chrysler conflicts with decisions of several other circuits and is contrary to *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Pet. App. 53a-55a. Those decisions make it clear that "U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to hire." *Id.* at 56a.

In an attempt to avoid the conflict among the circuits,[1] respondent National Labor Relations Board argues that this case does not call into question the rights of a successor employer under *Burns* and *Fall River Dyeing*, but instead concerns only "what *remedy* is appropriate when a successor has discriminatorily refused to hire employees in order to evade a bargaining obligation." NLRB Opp. at 12. In the Board's view, this case is unlike the contrary decisions of the Second Circuit and other courts of appeals because in those cases the employer "was not subject to a remedy for [a] violation of Section 8(a)(3) [discriminatory refusal to hire]." *Id.* at 15.

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[1] The Board suggests (Opp. at 10-11 n.13) that the judges of the court of appeals agreed *en banc* that there was no conflict among the circuits. But the document the Board cites is an order issued by one judge alone, Judge Ripple, the author of the majority opinion below. In light of Judge Easterbrook's dissenting opinion (see Pet. App. 54a, 56a), it is preposterous to suggest that the entire court agreed that no conflict exists.

a. The Board's attempt to avoid the conflict fails for two reasons. First, the complete remedy for U.S. Marine's allegedly discriminatory refusal to hire some of Chrysler's workers was the Board's order requiring U.S. Marine to hire those workers with full backpay.[2] The order requiring U.S. Marine to reinstitute Chrysler's terms – which applies to *all* employees, not merely to the 34 who were not hired – was the remedy imposed for U.S. Marine's refusal to recognize and bargain with the Union on behalf of all of the employees in violation of Section 8(a)(5).

The Board held that U.S. Marine refused to hire the 34 in order to avoid a bargaining obligation (Pet. App. 65a), and that had it hired those workers, it would have been obligated to consult with the Union before setting initial terms. Pet. App. 70a-71a. It therefore ordered U.S. Marine to reinstitute Chrysler's terms as a remedy for the company's failure to consult with the Union before setting those terms. *Id.* at 77a. But several courts of appeals have held that when a successor announces its intention to do so in advance, it is free to set its own initial terms even if it hires all of the predecessor's workers. See, *e.g.*, *Saks & Co. v. NLRB*, 634 F.2d 681, 687 (2d Cir. 1980); *International Association of Machinists v. NLRB*, 595 F.2d 664, 672-676 (D.C. Cir. 1978); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 880-882 (2d Cir. 1977); *NLRB v.*

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[2] Although we argue that the Board improperly shifted the burden of proof on the Section 8(a)(3) issue to U.S. Marine, we do not argue – and indeed *could* not argue – that reinstatement with backpay is not the appropriate remedy for a properly proven discriminatory refusal to hire. Pet. 27-30.

Spruce Up Corp., 529 F.2d 516 (4th Cir. 1975), enforcing 209 N.L.R.B. 194 (1974).

The failure of U.S. Marine to hire the 34 former Chrysler workers has nothing to do with the question of whether it was entitled to set its own initial terms. The Board's effort to characterize its order as justified by U.S. Marine's allegedly discriminatory hiring practices ignores the fact that in other circuits the company would have been allowed to set its own terms whether or not it had hired all of the predecessor's workers.

The Board does not dispute the critical fact that U.S. Marine told the former Chrysler workers in advance that it intended to set its own initial terms. Pet. App. 5a & 42a n.26. In fact, U.S. Marine set those terms before the initial group of employees began work on January 23, 1984, two days before the Union requested recognition on January 25 (the day on which the obligation to bargain with the Union began). *Id.* at 6a, 8a, 65a. As Judge Easterbrook emphasized, other courts of appeals faced with virtually identical circumstances have held that the successor employer was entitled to set its own initial terms, even though it was perfectly clear that it intended to hire substantially all of the predecessor's workers. *Id.* at 54a, 56a.

b. The second flaw in the Board's explanation remains even if we assume that the order requiring U.S. Marine to reinstitute Chrysler's terms was somehow a remedy for the company's refusal to hire the 34 workers as well as its refusal to bargain with the Union. Once again as Judge Easterbrook pointed out, the fit between the remedy and the violation is so imprecise as to make it

clear that the remedy is improperly punitive. Pet. App. 57a-60a. "Step one in resolving the question whether the Board's order is a remedy [rather than a punishment] is determining what would have happened if U.S. Marine had respected its obligations under the law." *Id.* at 52a. It is beyond dispute that had U.S. Marine recognized and commenced bargaining with the Union when it was asked to do so, and had it hired the remaining 34 former Chrysler workers, it still would have been able to set its own initial terms, just as it did. *Spruce Up Corp.*, 209 N.L.R.B. 194 (1975), enforced 529 F.2d 516 (4th Cir. 1975). It makes absolutely no sense to argue that the Board's order constitutes a proper "remedy" for U.S. Marine's refusal to bargain and its refusal to hire all of Chrysler's workers when it is clear that had U.S. Marine not violated the Act in those respects it still would have been entitled to set its own terms.

The court of appeals' reasoning, now repeated by the Board (Opp. at 13), that the remedy was appropriate because U.S. Marine "has made it impossible to determine precisely what terms and conditions would have been established had the employer bargained with the union" was effectively refuted by Judge Easterbrook. Pet. App. 55a-56a. It was *not* impossible (or even difficult) to determine what terms would have been set had U.S. Marine recognized the Union when asked to do so on January 25. By that time it had *already set* the initial terms of employment – as it had every right to do – and it stuck by those terms even after it commenced bargaining with the Union a few months later, on May 10, 1984. The Board's current speculation that U.S. Marine might have adopted Chrysler's terms if it had begun to bargain on

January 25 is not only completely far-fetched, it is also directly contrary to the record evidence. *Id.* at 59a.

Moreover, as Judge Easterbrook observed (Pet. App. 59a), the Board's decision was not based on a finding that U.S. Marine might have adopted Chrysler's terms had it agreed to bargain on January 25, or even on a finding that U.S. Marine's conduct made it impossible to determine the terms the parties would have agreed upon had bargaining begun at the appropriate time. See *Id.* at 69a-74a. The Board's rationale (*id.* at 71a) was that had U.S. Marine not discriminated against the 34 former Chrysler workers, it "would have retained substantially all the predecessor's employees" and therefore would not have been "entitled to set initial terms of employment without first consulting with the Union." As we demonstrate above and in our petition (20-24), that rationale conflicts with decisions of several courts of appeals, and the Board cannot use that rationale at this point to support the decision it originally reached based on a different theory. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

In the final analysis, it is simply impossible to reconcile this case with *Saks*, *Nazareth*, *Spruce Up*, and *Machinists*. Just as in those cases, U.S. Marine clearly announced in advance that it intended to set its own initial terms and conditions of employment. Under *Burns* and *Spruce Up*, U.S. Marine had the right to set its own terms even if it was "perfectly clear" that it intended to hire substantially all of the predecessor's employees. "If, as four other courts of appeals hold, U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to

hire, then these terms establish the benchmark that the Board is entitled to restore." Pet. App. 56a.

c. Perhaps recognizing the weakness of its argument on the merits, the Board asserts (Opp. at 17-18) that "review is not warranted because petitioners' remedial claim is jurisdictionally barred." We fail to understand how the Board can *defend* the court of appeals' decision by arguing that the court did not have jurisdiction to render it. Moreover, the court below decided both the jurisdictional issue and the *Burns/Spruce Up* issue, and the court's opinion will stand (and the conflict will continue) unless the decision is reviewed by this Court. If the Board seriously questions the court of appeals' jurisdiction, it should urge the Court to grant the petition and resolve the jurisdictional question.

In any event, the Board's jurisdictional argument was correctly and unanimously rejected by the court of appeals. See Pet. App. 30a n.17. After the Administrative Law Judge declined to order U.S. Marine to reinstitute Chrysler's terms, both the Board's General Counsel and the Union filed specific exceptions raising that issue. General Counsel's Exceptions at 2; Charging Party's Exceptions at 3. In its brief, the General Counsel argued that although "a successor is ordinarily free to set initial terms of employment," U.S. Marine was not in this case because of its "illegal hiring practices." General Counsel's Brief in Support of Exceptions at 21. The Union also extensively discussed the issue in its brief and argued that U.S. Marine sought "to circumvent [the *Burns*] principles and [to] utilize[ ] the Board's *Spruce Up* rationale in a manner so as to aid it in its unlawful overall

scheme * * * ." Charging Party's Brief in Support of Exceptions at 35.

In addition, the Board considered and discussed the issue at length in its decision. Pet. App. 69a-74a. Under the circumstances, the Board's argument that U.S. Marine was required as a jurisdictional matter to file a pointless motion for reconsideration is peculiar indeed.[3] The issue was raised by the exceptions filed by the General Counsel and the Union, was fully briefed, and was considered and decided by the Board.

Section 10(e) prohibits the courts of appeals from considering issues that were not presented to the Board; it cannot be read to require that the party seeking review of an issue be the same party who raised the issue before the Board. "Once an issue is raised before the NLRB, another party may litigate the issue on appeal." *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705,

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[3] The Board's rules provide that it will entertain a motion for reconsideration only under "extraordinary circumstances" (29 C.F.R. § 102.48(d)), and the Board has repeatedly held that it will not entertain motions for reconsideration that "raise[ ] no substantial issues that were not considered by the Board in its original Decision and Order." *Kahn's & Co.*, 256 N.L.R.B. 930 (1981). See also *International Alliance of Theatrical Stage Employees, Local 249*, 265 N.L.R.B. 637 (1982); *Kraft Foods, Inc.*, 254 N.L.R.B. 803 (1981); *International Union of Operating Engineers, Local 675*, 197 N.L.R.B. 244, enforced 82 L.R.R.M. (BNA) 2687 (D.C. Cir. 1972). Since the Board did consider and decide the issue of whether U.S. Marine should be required to reinstate Chrysler's terms in its original decision, it makes no sense to argue that U.S. Marine was required to file a motion for reconsideration that the Board by its own admission would not have entertained.

714 (9th Cir. 1986). See also *NLRB v. United States Postal Service*, 833 F.2d 1195, 1202 (6th Cir. 1987); *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794-795 (D.C. Cir. 1981); *Mourning v. NLRB*, 559 F.2d 768, 771 & n.5 (D.C. Cir. 1977). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that an issue on which an *employer* sought review was not preserved because it "was not raised during the proceedings before the Board, *either by the General Counsel* or by [the employer]") (emphasis added).[4]

II. As we demonstrate in the petition (27-30), the Board and the court of appeals required U.S. Marine to hire the 34 former Chrysler workers even though there was "no real, substantive, evidence that [U.S. Marine's] refusal to hire the 34 was based upon their union membership or upon their former employment with Chrysler" (Pet. App. 127a-128a) and there was "no substantive evidence of why one person was hired and one was not hired." *Id.* at 68a. The Board rested its decision in large part on the failure of U.S. Marine to supply "a convincing rationale" and to demonstrate "legitimate reasons" for its hiring decisions. *Id.* at 67a, 68a.

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[4] It is beyond dispute that if the Board had adopted the ALJ's decision and had refused to order U.S. Marine to reinstitute Chrysler's terms and conditions, the Union could have sought review in the court of appeals without filing a motion for reconsideration. To accept the Board's jurisdictional argument, the Court would have to conclude that the court of appeals had jurisdiction to consider an appeal by the Union, but not to consider an appeal on the very same issue by the employer. That result would make no sense and is not supported by either the language or the purpose of Section 10(e).

The Board and the court of appeals thus misapplied this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and improperly placed the burden on U.S. Marine at the *prima facie* case stage to prove that it had not acted unlawfully. The Board does not dispute (Opp. at 20-21) that the court of appeals' decision conflicts with the Second Circuit's initial decision in *Holo-Krome Co. v. NLRB*, 947 F.2d 588, 592 (2d Cir. 1991), but argues that the Second Circuit's supplementary opinion resolves that conflict. But the Second Circuit's "slight refinement" (slip op. 2) of its original decision does not go so far as the Board suggests. The court of appeals held merely that the Board may consider any explanations offered by the employer in deciding whether the General Counsel has presented a *prima facie* case. Slip op. 10. The court of appeals did *not* hold that the Board can require the employer to provide a "convincing rationale" for its conduct, and can decide that a *prima facie* case has been presented because the employer failed to convince the Board that there were "legitimate reasons" for its decision.[5]

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[5] The Union's suggestion (Union Opp. at 21) that this case is moot because the Hartford plant has been closed is entirely without merit. Petitioners continue in business and would be liable for massive amounts of backpay should the court of appeals' decision that U.S. Marine unlawfully refused to hire the 34 former Chrysler workers be allowed to stand. In addition, U.S. Marine employees (as well as the 34 former Chrysler workers) no doubt will claim to be entitled to additional retroactive pay and benefits should the Board's order requiring U.S. Marine to reinstitute Chrysler's terms of employment be enforced. The Board, quite properly, does not suggest that this case is moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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